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THE MARCH OF LAW: 1943.

A number of striking decisions have been rendered during the year 1943. They all show that the law has not been static. In many cases there has been a broadening from precedent to precedent; in a few cases a regressive tendency stands exhibited. An attempt is here made to advert briefly to the effect of the decisions of the Privy Council, the Federal Court and the Madras High Court in regard to some branches of the law.

1. *The High Court—Its powers and jurisdiction.*—In *Emperor* v. *Benoari Lal Sharma*[1], the Federal Court recognises that though by section 223 of the Constitution Act the framers of the constitution have expressed their anxiety to preserve the powers and prestige of the High Courts unimpaired, yet, under the express terms of that very section it is within the competency of the Indian Legislature to alter the jurisdiction and powers of the High Court and undoubtedly the Governor-General has power to legislate by Ordinance in case of emergency in respect of the powers and jurisdiction of the High Courts.

The decision of the Judicial Committee in *Ryots of Garabandho* v. *Zamindar of Parlakimedi*[2] that the High Court has no power to issue writs of *certiorari* to run into the mofussil has cut deeply into what has hitherto been regarded as well-established law and negatives the existence in the High Court of a power whose exercise in the past had operated as a potent check on and corrective of arbitrary actions by inferior tribunals exercising quasi-judicial powers. Of paramount importance is the pronouncement of the Privy Council in *Debi Prasad Sharma* v. *Emperor*[3], where it is pointed out that the jurisdiction in contempt which the High Court possesses should only be sparingly used and always with reference to the administration of justice and that the proper procedure in the case of an attack against a judge as an individual and not referring to the administration of justice will be to issue a simple contradiction or . . . . . if the matter amounted to a libel to pursue the remedies open therefor in law.

2. *The Bar—Its rights and disabilities.*—Notable points concerning the rights and disabilities of legal practitioners have come to the fore in two decisions of the High Court. The judgment of the Full Bench in *In the matter of a Pleader*[4], constitutes by implication at any rate a qualification of the rule propounded in *In the matter of a Pleader, Trichinopoly*[5], that since an advocate in this Presidency combines in himself the functions of both a solicitor and a barrister he is subject to the disabilities of both. The decision points out that an advocate here is not exactly in the same position as a barrister in England because there is here only a single agency and hence there is no reason why an advocate should not be allowed to act as the Legal Adviser of a company of which he is a Director provided his

1. (1943) 2 M.L.J. 207 (F.C.).
2. (1943) 2 M.L.J. 254 (P.C.).
3. (1943) 2 M.L.J. 569 (P.C.).
4. (1943) 2 M.L.J. 273 (F.B.).
5. (1942) 2 M. L. J. 196: I. L. R. (1943) Mad. 30.

remuneration is fixed beforehand. The ruling in *Visvanathan Chettiar* v. *Appa Naicken*[1] is noteworthy as re-affirming that an advocate in India has the same implied authority to compromise as he has in England.

3. *Constitutional Law.*—There have been during the year a number of important pronouncements of the Federal Court involving the important issue of the liberty of the subject. In *Keshav Talpade* v. *Emperor*[2], the Court held that rule 26 of the Defence of India Rules went beyond the rule-making power conferred by section 2 (1) of the Defence of India Act, 1939, which gives power to frame rules providing for the apprehension, etc., of persons suspected of certain matters. Although it was not necessary for the decision of the case, the Federal Court strongly hinted their view that the reasonable suspicion justifying apprehension must be a suspicion which is not merely reasonable to the apprehending authority but which is reasonable in fact as well. That is, the Court can go into the question of the reasonableness of the suspicions of the apprehending authority. A somewhat different rule was propounded by the House of Lords in *Liversidge* v. *Sir John Anderson*[3], which turned on the construction of the similarly worded Emergency Powers Act of Great Britain, but the Federal Court did not follow the English analogy distinguishing that case by observing that the conditions in India regarding apprehension and detention were different from those obtaining in England. *Emperor* v. *Benoari Lal Sharma*[4] lays down that the Special Criminal Courts Ordinance II of 1942 which empowers the executive authorities to order cases or classes of cases to go before a Special Court set up by the Ordinance and which does not lay down any general principles by which the executive authorities are to be guided in the exercise of their discretion to transfer cases to the Special Court amounts to a delegation of legislative authority to executive authorities and hence is unconstitutional. In In re *Allocation of Lands in Chief Commissioners' Provinces*[5], the Federal Court has held that the rights of a Province in respect of land vested in His Majesty for the purpose of the province but situated outside it are analogous to those of a private owner. In this case, the Federal Court expressed anything but affection for the system of advisory opinions which is in vogue in Canada but is unpopular in the United States of America and in Australia. In *Jagannath Baksh Singh* v. *The United Provinces*[6], the Federal Court has held that the U. P. Tenancy Act which cut down the rights claimed by the taluqdars to be comprised in the grants of their estates did not amount to compulsory acquisition of land without payment of compensation [prohibited by section 299 (2) of the Constitution Act.] Again what section 300 prohibits is the exercise of the executive authority of a province in such a manner as to derogate from certain grants ; the section places no restrictions on and can have no reference to, the exercise of the legislative authority of the province. The doctrine that a grantor may not derogate from his own grant cannot be applied in such a way as to limit legislative powers. The decision in *Afzalur Rahman* v. *Emperor*[7] holds that a Police Officer who can be dismissed by the D. I. G. of Police cannot be deemed to be a person " not removable from his office save by or with the sanction of a provincial government," and accordingly sanction of the provincial government to prosecute such an officer is not necessary under section 197 of the Criminal Procedure Code.

In *Emperor* v. *Sibnath Bannerjee*[8], the effect of Ordinance No. 14 of 1943 which by section 2 amended the wording of section 2 (1) of the Defence of India Act, 1939, so as to bring it into line with the wording of rule 26 of the Defence of India Rules and which by section 3 validated orders previously made under rule 26, came up for consideration. The Court held, while leaving the question of the validity of section 2 of the Ordinance open, because there were doubts whether an Ordinance can amend an Act of the Legislature retrospectively, that section 3 was perfectly valid. The ruling in *Padmanabham* v. *Kamaraju*[9] holds that where a question as to the interpretation of the Government of India Act is not raised before the High Court no certifi-

1. (1943) 2 M.L.J. 168.
2. (1943) 2 M.L.J. 90 (F.C.).
3. (1942) A.C. 206.
4. (1943) 2 M.L.J. 207 (F.C.).
5. (1943) 2 M.L.J. 137 (F.C.).
6. (1943) 2 M.L.J. 114 (F.C.).
7. (1943) 2 M.L.J. 62 (F.C.).
8. (1943) 2 M.L.J. 468 (F.C.).
9. (1943) 1 M.L.J. 314.

cate that the case is fit to go on appeal to the Federal Court will be granted by the High Court under section 205 of the Constitution Act. *Keshav Talpade* v. *Emperor*[1] holds that in the exercise of its appellate jurisdiction the Federal Court is not bound to give a judgment; it will merely make a declaration as to the law in the light of which the High Court from which the appeal has been carried must substitute a fresh judgment from the judgment appealed against.

4. *Criminal Law.*—An interesting point is made clear in In re *Mooka Nadar*[2] concerning the right of private defence. It holds that a person could not be deemed to lose possession of his land by merely going home for taking food or rest and that he could therefore defend his possession where necessary against an aggressor with force. In re *Vadivelu Asruthiyar*[3] decides a point, somewhat novel, and holds that forgery is committed even where a document is a false document in the name of a fictitious or non-existent person such as an idol.

5. *Hindu Law—(i) Adoption.*—Two decisions of the year in the law of adoption are of outstanding importance. *Kasi Viswanathan Chettiar* v. *Somasundaram Chettiar*[4] upholds the validity among Nattukottai Chettis of an adoption to a person after the death of his widow by a third party, namely, his father. The decision is given no doubt on foot of custom, but, in effect, it constitutes a qualification of the ordinary rule that none but a man or his widow can adopt to him. *Anant* v. *Shankar*[5] is a decision of the Privy Council which may be said to mark the triumph of logic over arguments of inconvenience and difficulties in application. It lays down that a valid adoption cannot be refused effect: the death of a sole surviving coparcener, be he a son or a collateral, cannot extinguish the capacity of the widow of a predeceased coparcener to adopt: nor can a partition among the coparceners before the adoption or the passing of the property by inheritance on the death of the sole surviving coparcener take away the power of the predeceased coparcener's widow to adopt. On adoption, the adopted son will be entitled to the property, whether ancestral or separate, of his father and hence can divest the same from the person in whom it had vested.

(ii) Joint family.—*Bhurumal* v. *Jagannath*[6] points out that in regard to a business carried on in the name of a coparcener there is no presumption that it is a joint family business though the joint family is possessed of some property. *Venkatachellam* v. *Venkateswara Rao*[7] lays down that it is not an invariable rule of law that a Hindu joint family in which there are minors cannot start a fresh joint family business. *Venkataramiah* v. *Tatayya*[8] elucidates that where one member of a family separates himself leaving the rest to continue together, the theory of re-union cannot arise at all; while the ruling in *Bhagabati Dei* v. *Muralidhar Sahu*[9] points out that where there has been a partition it requires very cogent evidence to establish a re-union. A far reaching pronouncement is to be found in *Rev. Kolandai* v. *Rev. Gnanavaram*[10] where it has been held that according to the Hindu religion, true piety transcends castes and creeds, that a Church is or at any rate should be as sacred to a devout Hindu as a temple must be to the true Christian and that it is within the competence of the manager of a joint Hindu family, owning considerable properties to make a gift of a small fraction of it for the erection of a church.

(iii) Succession.—The position of a half sister in the line of heirs as being immediately after a full sister and before a paternal uncle as implicit in the term "sister" in Act II of 1929 has been affirmed by a singularly strong series of decisions such as *Papammal* v. *Meenammal*[11], *Musammat Sahodra* v. *Ram Babu*[12] and *Musammat Besar Kuar* v. *Bishun Dev Singh*[13]. The decision in *Nagamma* v. *Linga Reddy*[14] is noteworthy for its repudiation finally of the validity of Dr. Sarvadhikari's "line

1. A.I.R. 1943 F.C. 72 (F.C.).
2. (1943) 1 M.L.J. 352.
3. (1943) 2 M.L.J. 445.
4. (1943) 1 M.L.J. 195.
5. (1943) 2 M.L.J. 599 (P.C.).
6. (1943) 1 M.L.J. 70 (P.C.).
7. (1943) 2 M.L.J. 610.
8. (1943) 2 M.L.J. 83.
9. (1943) 2 M.L.J. 68 (P.C.).
10. (1943) 2 M.L.J. 664.
11. (1943) 1 M.L.J. 1 : I.L.R. (1943) Mad. 235 (F.B.).
12. (1943) 1 M.L.J. 180 (P.C.).
13. (1943) 2 M.L.J. 459 (P.C.).
14. (1943) 1 M.L.J. 367: I.L.R. (1943) Mad. 759 (F.B.).

theory" in *bandhu* succession and for its laying down that in order that a person may inherit as a *bandhu* he has to satisfy only the test of degree and the test of mutuality and nothing more.

(*iv*) *Debts.*—The Privy Council ruling in *Hemraj* v. *Khemchand*[1] points out that the term "avyavaharika debt" does not admit of any more precise definition than Colebrooke's translation of it as a debt for a cause repugnant to good morals and affirms the view that it is the character of the debt at the time when the liability was first incurred that should be regarded to determine whether the doctrine of pious obligation attaches or not. The ruling in *Lakshmanaswami* v. *Raghavacharyulu*[2] makes it clear that all that the son has to prove to establish his immunity from pious obligation, in a suit by a creditor for the enforcement of the father's debt, is the immoral character of the debt; and that he need not show further that at the time of lending money the creditor had knowledge of the immoral purpose.

(*v*) *Maintenance.*—*Venkatasubbarathnamma* v. *Krishnayya*[3] takes special importance as being probably the first decision to assess the repercussions of the widow's rights of inheritance in respect of the non-agricultural property of her husband on her right to maintenance against his other property. It holds that in so far as the Act XVIII of 1937 does not take effect on certain property, the widow's old right of maintenance is preserved, but, in assessing the amount of maintenance, allowance should be made for the property which comes to her under the Act. The decision in *Venkataramaraju* v. *Rajagopalaraju*[4] is interesting for the principle laid down, which will be applicable to all matrimonial litigations irrespective of the religion or caste of the parties, namely, that condonation cannot be conditional and when cohabitation between the wife and husband has been resumed, the husband cannot be deemed to be on probation so that the previous cause of action regarding separate maintenance on foot of cruelty can be revived at will if the wife is not satisfied with the husband's behaviour.

(*vi*) *Mahomedan Law.*—*Ramija Bibi* v. *Sharifa Bibi*[5] holds that *Beeju Bee's case*[6] is not overruled by the Privy Council in *Maina Bibi* v. *Chaudhry Vakil Ahmad*[7] and that when a Mahomedan widow has not been paid her dower she is entitled to retain possession of her husband's properties and the properties cannot be divided among the heirs until the dower has been satisfied. In *Zohara Khatum Bibi* v. *Mahbub Bi*[8] it is held that the fact that a gift was conditional on the donee paying the rents to the donor during her lifetime will not detract from the validity of the gift.

(*vii*) *Insolvency.*—Perhaps the most far-reaching of the decisions on Insolvency law is that of the Privy Council in *Mahomed Siddique Yusuf* v. *Official Assignee of Calcutta*[9] where it has been held that an order of adjudication under the Presidency Towns Insolvency Act, is conclusive and the finding therein that the transfer alleged as the act of insolvency was one by way of fraudulent preference binds the transferee even if he was not a party to the adjudication proceedings and that his only remedy will be to prefer an appeal against the order of adjudication in so far as it affects him. Equally important is the ruling of their Lordships in *Chockalingam Chettiar* v. *Official Assignee of Madras*[10], where Lord Russell of Killowen has laid down that on the insolvency of the undivided son of a deceased father, the creditors of the latter will be entitled to be paid in priority before the separate estate of the father is applied to any extent in paying the son's creditors but that the father's creditors will not be entitled to any such priority in respect of the joint family estate. *Nagiah* v. *Satyanarayana Prasad*[11] points out that the creditor's refusal to receive monies deposited in Court, though he was entitled to payment under an order of Court, will be sufficient proof of his *mala fides* in presenting an application for adjudication which should therefore be

1. (1943) 2 M.L.J. 397 (P.C.).
2. (1943) 1 M. L. J. 104: I. L. R. (1943) Mad. 717.
3. (1943) 1 M.L.J. 235.
4. (1943) 2 M.L.J. 641.
5. (1943) 1 M.L.J. 303.
6. (1919) 37 M.L.J. 627: I.L.R. 43 Mad. 214 (F.B.).
7. (1924) 48 M.L.J. 667: L.R. 52 I.A. 145: I.L.R. 47 All. 250 (P.C.).
8. (1943) 2 M.L.J. 99.
9. (1943) 2 M.L.J. 160 (P.C.).
10. (1943) 1 M.L.J. 239: I.L.R. (1943) Mad. 603 (P.C.).
11. (1943) 1 M.L.J. 262.

deemed to be an abuse of the process of Court. The decision in *Thangavelu Chetti* v. *Chockalingam Chetti*[1] recognises the principle that where the whole reason and basis of an order directing the sale of property have disappeared the Court should save from sale the property of the insolvent, as for instance, where all the creditors have been paid in full. *Virupaksha Reddi* v. *Chanalal Siva Reddi*[2] makes it explicit that under the Provincial Insolvency Act neither the father's nor the manager's power to sell the shares of the other members of the family can vest in the Official Receiver on the adjudication as insolvent of a father or manager in a joint Hindu family and thus completes the picture drawn in *Rama Sastrulu's case*[3]. *Chanbasappa* v. *Official Receiver of Bellary*[4] lays down that the very order vesting the properties in an appointee on the annulment of insolvency implies that he might sell the property and distribute the proceeds among the creditors without applying for any special directions to sell. The ruling in *Karunakara Menon* v. *Sankaran Unni*[5] points out that there is an analogy between annulment of adjudication and the granting of an absolute order of discharge with the result that even after the passing of an order of complete discharge, proceedings pending under section 53 or section 54 could be continued by the Official Receiver unless orders to the contrary are made. The Privy Council decision in *Govinda Prasad* v. *Pawan Kumar*[6] clarifies a point on which previously there was no definite lead, by laying down that the words " annulled under this Act," in section 78 (2) would include an annulment resulting from the setting aside of the adjudication by an appellate Court, apart from the annulling under the express provisions of the Act.

(*viii*) *Property*.—In spite of a contrary opinion held by some of the other High Courts a Full Bench of the Madras High Court has in *Kanakamma* v. *Krishnamma*[7] reaffirmed its earlier view that section 53 (*a*) of the Transfer of Property Act has retrospective operation. The limits of the duty of a vendor in regard to production of title deeds for inspection by the vendee are set out in *Ratna Bai* v. *Mrs. Barras*[8] by stating that the seller's duty is only to produce the documents in his possession or power and that a vendee is not entitled to search for and obtain copies of other documents at the vendor's expense. The ruling in *Subba Rao* v. *Varadiah*[9] deals with the interesting point whether the benefit of reduction in a mortgage debt payable by a person consequent upon scaling down under the Madras Agriculturists' Relief Act could be claimed by the buyer of property, where the sale was free from encumbrances and a portion of the purchase money had been left with him for the specific purpose of discharging the mortgage of the property. The decision in *Egmore Benefit Society* v. *Aburupammal*[10] by holding that a mortgagee cannot in the exercise of a private power of sale conferred on him by the mortgage deed, buy the mortgaged property himself in spite of the existence of a covenant in the deed enabling him to do so, illustrates how peremptory is the rule that a man cannot contract with himself a principle based upon public policy. *Sivaraj Lal* v. *Mylapore Hindu Permanent Fund, Ltd.*,[11] constitutes a valuable exposition of the law relating to a mortgagee's liability to account on the footing of wilful default and holds that no such liability can arise in a case of mortgage with possession and lease back to the mortgagor, where the mortgagee never had actual possession. A point in the law relating to contribution under section 82 of the Transfer of Property Act is illustrated in *Damodaraswami Naicken* v. *Govindarajulu Naidu*[12] where it is ruled that the words "in the absence of a contract to the contrary " in section 82 relate only to a contract to which the mortgagee is a party and such a contract will run with the land. The decision in *Ramlal Dutt Sarkar* v. *Direndranath Roy*[13] is noteworthy as the first authoritative pronouncement by the Privy Council that the English doctrine of suspension of rent, where a tenant has not been given possession of a portion of the land demised, the rental

1. (1943) 2 M.L.J. 572.
2. (1943) 2 M.L.J. 87.
3. I.L.R. (1943) Mad. 83 (F.B.).
4. (1943) 1 M.L.J. 127.
5. (1943) 2 M.L.J. 134.
6. (1943) 2 M.L.J. 121, 125 (P.C.).
7. (1943) 1 M.L.J. 337 (F.B.).
8. (1943) 1 M.L.J. 461.
9. (1943) 1 M.L.J. 279.
10. (1943) 1 M.L.J. 93.
11. (1943) 1 M.L.J. 472: I.L.R. (1943) Mad. 430.
12. (1943) 1 M.L.J. 291.
13. (1943) 1 M.L.J. 514 (P.C.).

being a lump rental, is inapplicable in India. Sir George Rankin points out that the doctrine could not be followed in this country even as a matter of justice and equity in view of the difference in the conditions prevalent here. "The English context of English decisions must be borne in mind—the social system, the character of the country side, the well-settled boundaries, the limited term of leases."

Estates Land Act.—The precise significance of the term "whole village" in the context of section 3, sub-section 2, clause (*d*) of the Estates Land Act fell to be expounded in *Ademma* v. *Satyadhyana Thirthaswami Varu*[1] and *Suri Reddi* v. *Agnihotrudu*[2] where it has been made clear that if the area comprised in the grant is less than the total area of the village, the grant will not be a grant of the whole village. A point of practical importance is laid down in *Ramakrishnayya* v. *Krishnayya*[3] which holds that in the case of land becoming an estate by virtue of Madras Act XVIII of 1936 proceedings for settlement of rent are not necessary prior to the filing of suits for the recovery of rent. The decision of the Privy Council in *Ryots of Garabhando* v. *Zamindar of Parlakimedi*[4] is one of considerable importance in regard to the principles guiding settlement of rent under Chapter XI of the Estates Land Act. Dissenting from the observation of the Madras High Court that the words—"shall have regard to the provisions of this Act for determining the rates of rent payable by a ryot"—in section 168 (2) can only apply to the provisions of the Act which have general application, and approving the view that the requirement to have regard to the provisions of the Act has no more definite or technical meaning than that of ordinary usage, Viscount Simon, L.C., points out that while in Chapter III of the Act the existing rent is a statutory *datum line*, under Chapter XI the existing rent has only the benefit of a presumption and its fairness has to be probed.

Irrigation cess.—Two pronouncements of the Privy Council touch upon irrigation cess and one contains a valuable exposition of the law relating to water-rights. *The District Board of West Tanjore* v. *The Secretary of State*[5] recognises that the Board has now held in the *Swamigal case*[6] that the principles of the *Urlam case* would apply to inams also. The decision in *Secretary of State* v. *Thinnappa Chettiar*[7] lays down that in the case of grants by Government the extent if any of the right of taking water that would pass to the grantee would depend upon the terms of the grant in question; the fact that the grant consisted only of an assignment of land revenue and not of both varams may not be material; that the non-specification of the jamma at the time of the grant would only mean that the Government did not wish to detract from the grant by levying any rent and that like the Permanent Settlement and the Inam Settlement the grant in question constituted an 'engagement' with the Government within the meaning of Proviso 1 to section 1 of the Madras Irrigation Cess Act.

Contracts.—In *Raja Mohan Namucha* v. *Mansur Ahmad Khan*[8], the Judicial Committee has held that an agreement may be discovered to be void at a date subsequent to the agreement and that it does not necessarily follow that in every case where section 65 of the Indian Contract Act which deals with the restoration of benefits received by a party to an agreement which is discovered to be void is held to apply, the date of such a discovery must as a matter of law be equated with the date of such agreement. Again a person's right to recover monies under section 65 is not prejudiced either by reason that he bases his cause of action on the void agreement (because that does not amount to unequivocal election to stick to the latter remedy), or because he does not mention his rights under section 65 as a ground in the trial Court or in the lower appellate Court. In order to do substantial justice such a ground may be permitted to be taken for the first time before the final appellate Court as well. While in India, section 65 is clear on the point that in the case of void agreements any party who has received any benefit under such agreement must restore it, unfortunately in England on the authority of cases like

1. (1943) 2 M.L.J. 289.
2. (1943) 2 M.L.J. 528.
3. (1943) 2 M.L.J. 494.
4. (1943) 2 M.L.J. 254 (P.C.).
5. (1943) 2 M.L.J. 321 (P.C.).
6. (1942) 2 M.L.J. 367 : L.R. 69 I.A. 22 : I.L.R. (1942) Mad. 893 (P.C.).
7. (1943) 2 M.L.J. 382 (P.C.).
8. (1943) 1 M.L.J. 508 (P.C.).

Chandler v. *Webster*[1], a different rule has prevailed. It is satisfactory to note that the House of Lords has recently in the *Fibrosa case*[2] rid the English Law of this onerous heritage and laid down the law in consonance with the principles of natural justice. In *Kothandapani Mudaliar* v. *Dhanammal*[3], it has been held that past illicit cohabitation may validly support a promise to pay a sum of money. This decision is in accordance with the English law on the subject, but a catena of decisions of the Bombay High Court has taken a different view as also a decision of a single Judge of the Madras High Court. In *Taranatha Bhatta* v. *Gopalakrishnayya*[4], it has been held that a person's father-in-law's brother's wife cannot be said to stand in a near relation to him within the meaning of section 25 (1) of the Contract Act. *Ramaswami Aiyar* v. *Saptharishi Reddiar*[5] holds that where a person agrees to pay double the amount payable in case of default, such a stipulation is a penalty. Cases like *Kunju Nair* v. *Narayanan Nair*[6] which hold that where a person who has agreed to pay a certain sum by instalments undertakes to pay the whole sum in case of default in the payment of any instalment, such a clause is not a penalty, are distinguished. *Travancore National Bank Subsidiary Co., Ltd.* v. *Tranabank Union*[7] lays down that where a member of an unregistered union of the employees of a firm signs an agreement on behalf of the union the union cannot be sued on the contract and only the person who has signed can be proceeded against. In *Dalmia Cement Co., Ltd.* v. *Lourduswami Pillai*[8], the Court held that where a power is reserved under the terms of a contract to a party thereto to deviate from it, the power cannot be exercised, to add to, or deduct from the contract in such a way as to transform it into one, that is to all intents and purposes a new contract. Where a term of a building contract is that the building should be built with "granite jelly" if one party wishes to alter such a term into building with "lime stone jelly" the deviation will be one which practically extinguishes the original contract. *Muralidhar Chatterji* v. *International Film Co., Ltd.*,[9] lays down that money received by a party in part discharge of the consideration due or becoming due though applied for defraying the expenses of his part of the contract and spent for that purpose is nevertheless a benefit or advantage had by him liable to be restored under section 65 of the Indian Contract Act on his rescission of the contract. Sections 64 and 65 do not refer by the words 'benefit' and 'advantage' to any question of profit or clear profit nor does it matter what the party receiving the money may have done with it.

Agency.—*Valarshak Seth Apcar* v. *Standard Coal Co., Ltd.*,[10] has reference to a broker employed by a seller to introduce him to a prospective purchaser. Such a broker is entitled to be paid whatever is in the circumstances the usual commission on all contracts resulting from that introduction. It may well be that a subsequent contract is the fruit not of the introduction but of the satisfactory business relationship which the introduction established, in which case, it carries no commission for the broker.

Partnership.—*Hakim Rai* v. *Ganga Ram*[11] holds that in a suit for accounts brought nearly two years after the dissolution of a partnership against the former managing partner, interest is chargeable against the accounting defendant even though he has not acted fraudulently, from the date of the institution of the suit until realisation. *Suleman* v. *Abdul Latiff*[12] where such interest was not allowed is distinguishable because it was an ordinary suit for dissolution and winding up of the affairs of a going partnership. In *Gouri Dutt Ganesh Lal Firm* v. *Madhava Prasad*[13], it is laid down that where a person is taken as a partner in a joint Hindu family business and he acknowledges earlier debts the novation constituted by the substitution of the fresh partnership for the previous joint family liability is enough of itself to form a sufficient consideration for the new partner's undertaking to pay the firm's liabilities.

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1. (1904) 1 K. B. 493.
2. (1942) 2 All.E.R. 122.
3. (1943) 1 M.L.J. 156.
4. (1943) 1 M.L.J. 422.
5. (1943) 1 M.L.J. 297.
6. (1932) 65 M.L.J. 29.
7. (1943) 1 M.L.J. 425.
8. (1943) 1 M.L.J. 303.
9. (1943) 2 M.L.J. 369 (P.C.).
10. (1943) 2 M.L.J. 405 (P.C.).
11. (1943) 1 M.L.J. 16 (P.C.).
12. (1930) 59 M.L.J. 121: L.R. 57 I. A. 245: I.L.R. 58 Cal. 208 (P.C.).
13. (1943) 2 M.L.J. 417 (P.C.).

Specific Relief.—In *Pitchayya* v. *Venkatakrishnayya*[1], it was held that an agreement to sell in favour of a person certainly gives him a right as to or in relation to the property which is the subject of the agreement. Hence such a vendee though he has no right "in any property" has a right "as to such property" within the meaning of section 42 of the Specific Relief Act. Under section 27 (*c*) specific performance can be decreed not merely against a party to the contract but also against a person claiming under a title which though prior to the contract and known to the plaintiff might have been displaced by the defendant. *Humayun Begum* v. *Mohamed*[2] lays down that "further relief" mentioned in section 42 is other relief against the defendant against whom a declaration is sought. The fact that the plaintiff has a ground for further relief against some one who is not a party to the suit or who has ceased to be such a party will not disentitle him to the declaratory relief under the section. *Subramaniam Chettiar* v. *Arunachalam Chettiar*[3] holds affirming *Veerasalingam* v. *Sathiraz*[4] that a suit by the vendor for the recovery of purchase consideration is a suit for specific performance within the meaning of Chapter II of the Specific Relief Act.

Negotiable Instruments.—*Rangiah Naidu* v. *Sundaramoorthi Mudaliar*[5] concedes the right of a person to plead the material alteration of a pro-note when sued thereon even when such an alteration is beneficial to him. In *Subramania Sastri* v. *Krishna Brahmam*[6], it was held that where on a pro-note the names of two persons are mentioned as payees and no firm's name of which they are partners has any mention, a suit by the two persons in their personal capacity is maintainable.

Company Law.—In *Public Prosecutor* v. *Coimbatore National Bank, Ltd.*[7], it was held that the failure of a company to report particulars of changes in other directorships held by one of the company's directors is an offence under section 87 (2) of the Companies Act even though the company has no knowledge of the change; and that the words "knowingly and wilfully" occurring in that section refer only to natural persons and not to artificial persons like companies. With respect, it may be pointed out that when a company can be made liable for torts involving fraud or malice, like malicious prosecution, defamation, fraudulent misrepresentation, etc., through the acts of its agents, it is a little difficult to see why it cannot be imputed with the knowledge referred to in the section gathered through its agents. Again the maxim that penal statutes should be construed strictly has reference only to cases where such construction would be beneficial to the accused and not to cases like the present one where such a construction would be destructive of the security of the accused. It may be that on necessary occasions penal statutes will have to be construed even in a liberal manner so as to favour the accused. *Public Prosecutor* v. *Anantakrishna Iyer*[8] holds that even a company incorporated before the Indian Companies (Amending) Act of 1936 which capitalises its reserve fund is guilty of failure to maintain the fund within the meaning of section 277 (*k*) (1) [which section prohibits the utilisation of the reserve fund in any way other than in accordance with section 277 (*k*) (3)]. *Radhakrishna Chettiar* v. *Official Liquidator*[9] holds that where a mortgage of any movable property of a company amounts also to a pledge, registration is not necessary under section 109 (1) of the Companies Act in order that the mortgage may be enforceable against the creditors of the company or the liquidator. *Karnataka Bank, Ltd.* v. *Ramchandra Rao*[10] holds that the power of a company under section 152 (1) to refer the disputes between it and another company to arbitration in accordance with the Indian Arbitration Act does not exclude the arbitration under the Civil Procedure Code. *Chokkalingam Chettiar* v. *Official Liquidator of Nagarathar National Bank*[11] lays down that an order directing public examination of the directors of a bank in liquidation is appealable under section 202 of the Companies Act; and that under section 196 notice need not be given to the

1. (1943) 1 M.L.J. 404.
2. (1943) 2 M.L.J. 76 (P.C.).
3. (1943) 2 M.L.J. 424 (F.B.).
4. (1908) 19 M.L.J. 220.
5. (1943) 1 M.L.J. 380.
6. (1943) 1 M.L.J. 61.
7. (1943) 1 M.L.J. 119.
8. (1943) 2 M.L.J. 19.
9. (1943) 1 M.L.J. 142.
10. (1943) 2 M.L.J. 489.
11. (1943) 2 M.L.J. 499.

directors of a company before the Court passes an order directing their public examination. *Calicut Bank, Ltd.* v. *Nekkat*[1] holds that even for continuing execution proceedings against a banking company which has been wound up the sanction of the Court is necessary under section 171.

Torts.—Hindusthan Gilt Jewel Works v. *Gangayya*[2] lays down that statements made by parties to a civil suit in pleadings are absolutely privileged provided the statement has reference to the enquiry. The ruling of the Full Bench in *Thiruvengada Mudali* v. *Thirupurasundari Ammal*[3] allowing only qualified privilege to statements made in complaints to Magistrates which was based on the interpretation of the relevant sections of the Indian Penal Code has no application to civil proceedings. *Mahomed Rowther* v. *Shanmugha Sundaram Chettiar*[4] rules that where a house used for the purpose of storing fireworks is gutted consequent on explosion that fact "talks" and hence in a suit for damages by the lessor against the lessee the onus is thrown on the latter to disprove negligence on his part. *Muhammad* v. *Chakkappayyan*[5] holds that the reasonable suspicion that an offence is about to be committed which justifies a police officer arresting a person without warrant without exposing himself to an action for false imprisonment means a *bona fide* belief that such an offence is likely to be committed. Again the fact that a police officer was acquitted in criminal proceedings relating to the same matter is no bar to an action for false imprisonment being brought against him subsequently.

There is evident a notable and recent tendency on the part of the English Courts to weed out the excrescences and anomalies of English law which have their roots in obsolete procedure and bygone legal history. One such instance is furnished by the recent decision of the Court of Appeal in *Simon* v. *Islington Borough Council* which holds that the anomalous rule of immunity for non-repair of roads claimed by and allowed to local authorities, by a consistent trend of decisions beginning with *Cowley* v. *New Market Local Board*, applies only to the non-repair of the road as such and has no application where the authority has undertaken other duties in regard to the road by breach of which damage is caused ; in the latter case the local authority is liable. But our interest in the case lies in the fact that even in India this legal relic was cited to negative the liability on the part of Municipal Councils for the non-repair of roads in cases like *Achratlal* v. *Ahmedabad Municipality*[6]. The recent decision of the Court of Appeal should help to check such a tendency and prevent the injustice of enthroning of the "*lex*" when the "*ratione legis*" on which it was based has been knocked out.

Civil Procedure Code.—The decision in *Mani Lal* v. *Venkatachalapathi Aiyar*[7] is valuable as re-affirming the principle, which had sometimes been questioned, that an offer when accepted by post is accepted at the place where the letter of acceptance is posted and therefore the cause of action arises there. In *Muthukaruppa Ethandar* v. *Appavu Nadar*[8], it is laid down that where there is a debt payable by an entire village, a representative suit to enforce its payment will lie and the fact that permission to sue the defendants named in the plaint as the representatives was accorded not before but after the notification by public advertisement of the institution of the suit, will not, where no prejudice was caused, amount to a contravention of Order 1, rule 8.

Tirupathi Devasthanams Committee v. *Krishnayya Shanbogue*[9] is an important ruling of a Full Bench of five Judges that a suit by the general trustees of a temple against a trustee of a fund contributed by the devotees for being made over to the temple praying for a decree directing accounts and enquiries and for the recovery of the amount to be ascertained on the taking of accounts, is not within the meaning of section 92, Civil Procedure Code, and does not require the Advocate-General's

1. (1943) 2 M.L.J. 448.
2. (1943) 1 M.L.J. 186 : I.L.R. (1943) Mad. 685.
3. (1926) 51 M.L.J. 112 : I.L.R. 49 Mad. 728 (F.B.).
4. (1943) 1 M.L.J. 188.
5. (1943) 1 M.L.J. 447.
6. (1904) I.L.R. 28 Bom. 340.
7. (1943) 1 M.L.J. 352.
8. (1943) 1 M.L.J. 454.
9. (1943) 1 M. L. J. 388 : I.L.R. (1943) Mad. 619 (F.B.).

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sanction. The decision indicates that in determining whether a suit falls under section 92 the Court must go beyond the reliefs sought and have regard to the capacity in which the plaintiffs are suing and to the purpose for which the suit is brought. In *Fatima Bibi* v. *Mohammad Usman Sahib*[1] it is pointed out that while an order for attachment does not interfere with adverse possession the filing of a suit for a declaration of the right to attach the property against the person in possession is another matter. The ruling of the Federal Court in *Venugopala Reddiar* v. *Krishnaswami Reddiar*[2] makes it clear that the Constitution Act has not taken away the jurisdiction of British Indian Courts to continue the suit concerning immovable property situate in Burma as part of the subject of the suit which had been filed under section 17, Civil Procedure Code, before the separation of Burma from British India.

Anjayya v. *Gundarayudu*[3] is a notable pronouncement which holds that an appeal does lie from an order of the Court purporting to make the order under a provision of law wrongly assumed by it to be applicable, provided that an appeal is ordinarily permitted against orders rightly made under that provision. The ruling of the Full Bench in *Venkata Rao* v. *Satyanarayanamurthi*[4] lays down that a defendant-respondent who has not taken any cross-objections to the partial decree passed against him could urge in opposition to the appeal of the plaintiff, a contention, which, if accepted by the trial Court would have necessitated the total dismissal of the suit. The judgment of the PrivyCouncil in *Sheikh Rahmat Ilahi* v. *Mahomed Hayat Khan*[5] explains the scope of sections 100 and 103 of the Civil Procedure Code and holds that the failure to appreciate and determine a question of fact which vitally affects the issue stated in the case will be a question of law. *Hem Raj* v. *Khem Chand*[6] is a decision of the Privy Council laying down the effect of "special leave" granted by His Majesty in Council, namely, that where such leave is given the respondents cannot raise the objection that the appeal is incompetent as the sum involved is below Rs. 10,000 and that the case is otherwise not a fit one for appeal under the Civil Procedure Code. *Ramanathan Chettiar* v. *Kasi Chettiar*[7] points out the scope of an order for stay passed under Order 21, rule 29 that it extends only for the duration of the pending suit and no longer. In *Bhawani Shankar Joshi* v. *Gordhandas Jamnadas*[8], the Judicial Committee lays down that ratification in law is equal to previous authority and therefore would validate the assignment of a decree by an agent who had no authority at the time of the execution so as to enable the assignee to apply under Order 21, rule 16 of the Civil Procedure Code. *Nachimuthu Chetti* v. *Palani Ammal*[9] holds that the holder of a money decree for a larger sum can claim a set off of such sum against the entire sum due under a mortgage decree held against him by his judgment-debtor for a lesser sum. In *Rohini Ramandwaj Prasad Singh* v. *Har Prasad Singh*[10], the Privy Council makes it clear that where a decree is varied or reversed in circumstances giving rise to a right by way of restitution, the right arises automatically and is claimable under section 144 before the trial Court.

Criminal Procedure Code.—*Ranga Konar* v. *Pakkiri Vattachi*[11] emphasises that although it is not necessary under section 422 of the Criminal Procedure Code to give notice to a complainant of the filing of an appeal though he was awarded compensation, still it is always a salutary practice to do so. In re *Sevagaperumal*[12] lays down that it is obligatory for the Appellate Court to obtain and examine the records at the time of hearing and hence where the records are destroyed by fire in the trial Court and no copies are available the only course possible is to order a re-trial. The ruling in *Thakur Shah* v. *King-Emperor*[13] of the Privy Council is of importance and points out that section 423 gives wide powers to the Court to amend a charge in an

1. (1943) 1 M. L. J. 212 : I.L.R. (1943) Mad. 696.
2. (1943) 2 M.L.J. 57 (F.C.).
3. (1943) 2 M.L.J. 539 : I.L.R. (1943) Mad. 702.
4. (1943) 2 M.L.J. 336 (F.B.).
5. (1943) 2 M.L.J. 606 (P.C.).
6. (1943) 2 M.L.J. 397 (P.C.).
7. (1943) 2 M.L.J. 452.
8. (1943) 2 M.L.J. 48 (P.C.).
9. (1943) 2 M.L.J. 596.
10. (1943) 2 M.L.J. 460 (P.C.).
11. (1943) 1 M.L.J. 493.
12. (1943) 1 M.L.J. 129.
13. (1943) 2 M.L.J. 532 (P.C.).

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appeal subject only to the limitation that no course should be taken by reason of which the accused may be prejudiced either because he was not fully aware of the charge made or is not given a full opportunity of meeting it.

Registration Act.—Subramanian Chettiar v. *Meyammai Achi*[1] lays down the important rule in the law of registration that a document which creates a right to or in immovable property requires registration and where it is not registered it is inadmissible in evidence. In *Subbarama Reddi* v. *Subba Reddi*[2] it is held by a Full Bench that in the absence of any male agnate of the husband the father of a minor girl will be a natural guardian within the meaning of section 32 of the Registration Act to present a will of the girl's deceased husband for registration. A noteworthy point is laid down by the Full Bench in *Subramanian Chettiar* v. *Arunachalam Chettiar*[3], which decides that an unregistered document relating to immovable property may be received as evidence of the contract relating to the same and is sufficient to support a suit for specific performance.

Court-fees.—The law relating to court-fees is clarified in a number of pronouncements. In re *Sevugan Chettiar*[4], a beneficial principle is propounded that where the original certificate for the refund of court-fee paid on a memorandum of grounds of appeal is shown to have been lost, the Court may grant a duplicate certificate specifying therein that it was issued on the representation that the original had not been cashed. The court-fee payable on a claim of dissolution of a partnership at will with a claim for accounts was held in *Manikyala Rao* v. *Pullayya*[5] to be covered by section 7, sub-section 4, clause (*f*), the intervention of the Court not being necessary to bring about the dissolution.

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Limitation.—Some of the decisions on the law of limitation are highly interesting. In *Lala Hemchand* v. *Peare Lall*[6] the Privy Council has held that section 10 of the Limitation Act is inapplicable where the provision in a will creating a charitable trust is inoperative in law and that the position of the executor will be adverse to that of the heir-at-law, so much so, if he holds it for the statutory period on behalf of the charity, the title acquired by the charity would vest in it and bar the title of the heirs of the testator. The scope of section 10 as not being limited to tracing actions is made clear in *Chidambara Vinayagar Devasthanam* v. *Chidambaram Chettiar*[7] which holds that the section is applicable to a case where the trustee or the legal representative is asked to account for the money that was in his hands as a trustee. *Srinivasalu Chetti* v. *Munisami Chetti*[8] deals with an important question under section 6 and lays down that where the existence of a reversioner at the date of the challenged alienation clothes an after-born nearer reversioner with a right to sue, though the latter cannot in his own right claim the benefit of section 6, yet, he can avail himself of the extended period which will be available to the reversioner who was in existence at the time of the alienation, he also being then a minor. Disapproving the view expressed in *Shankara Menon* v. *Kuttani*[9] the decision in *Seth Nandaram Das Atmaram* v. *Zulika Bibi*[10] holds that where a party is already on the record either as a plaintiff or as a defendant an amendment which merely alters the capacity in which he has been impleaded to one of a different character does not involve an addition of parties so as to attract the provisions of section 22 of the Limitation Act. The ruling in *Raghaviah* v. *Vasudevayya Chetti*[11] lays down that for purposes of section 14 though good faith of a party might normally be established by his acting upon professional advice still where the advocate himself did not act in good faith, his client cannot rely upon his advice as establishing his own good faith. As to what is a "final order" within the meaning of article 182 (5) has been settled by a number of decisions. The result that emerges from them is that an order putting an end to the application in question, where it is one in accordance with law, is a final

1. (1943) 2 M.L.J. 15.
2. (1943) 1 M.L.J. 272 : I.L.R. (1943) Mad. 462 (F. B.).
3. (1943) 2 M.L.J. 424 (F.B.).
4. (1943) 2 M.L.J. 377.
5. (1943) 2 M.L.J. 130.
6. (1943) 1 M.L.J. 11 (P.C.).
7. (1943) 2 M.L.J. 339.
8. (1943) 1 M.L.J. 157.
9. A.I.R. 1940 Mad. 639.
10. (1943) 2 M.L.J. 1.
11. (1943) 2 M.L.J. 375.

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order, whether the application was numbered or not, directed to be registered or not, or was admitted or not. See *Ramachandra Naidu* v. *Muthu Chettiar*[1], *Shanmugham Pillai* v. *Namagiri Ammal*[2], *Mahalakshmi Ammal* v. *Subramania Chettiar*[3]. And in *Govind Prasad* v. *Pawan Kumar*[4], it is pointed out by Sir Madhavan Nair that the words "in accordance with law" in article 182 (5) of the Limitation Act mean "in accordance with the law relating to the execution of decrees."

JOTTINGS AND CUTTINGS.

Unusual Oaths.—The Court at Croydon recently witnessed the unusual spectacle of an Englishman with upraised arm taking the oath in the following form : "I swear as in the presence of Buddha that I am unprejudiced, and if what I speak prove false, or if by my colouring truth others shall be led astray, then may the three holy existences together with the devotees of the twenty-two firmaments, punish me and also my migrating soul." A Hindu, I believe, must swear facing the Ganges and this once created some difficulty at Brighton Police Court. It was at Brighton that, for the benefit of a Mohamedan witness, they produced from the public library the Koran found in the private apartments of the King of Delhi when the City was taken in 1857. About a year ago an extremely unusual oath was taken at Clerkenwell County Court when a man claiming to be King of Poland swore by Apollo to give true evidence. All these oaths have less dramatic emphasis than the Chinese form requiring the breaking of a saucer with the addition of the words : "The saucer is cracked. If I do not tell the truth my soul will be cracked like the saucer." Avory, J., once tried a case at Liverpool arising out of a feud between two Chinese gangs. So many witnesses went into the box that by the time the last one appeared he was ankle deep in crockery. It was at Liverpool County Court that a witness was provided with a saucer so solid that it rebounded intact when thrown down. After three attempts it was broken by being hammered on the floor.—*S.J., 1943, p. 75.*

The McNaghten Rules and the Encephalograph.—In *R.* v. *Lees Smith*, on 17th March, the charge was one of murder, and medical evidence was given that the prisoner had visited a hospital in order to have mental tests taken by an electrical instrument called the encephalograph, which showed that he had an abnormal personality associated with minor defects of the nervous system or, as his counsel described it, "a brain with distorted and exaggerated rhythms." In his summing up the learned Judge said that the prisoner's abnormalities prevented him for having the same chance in life as other people, but, he asked, were they such as to constitute a mental disease which either made him unable to know what he was doing, or unable to know what he was doing was wrong. Every one of the doctors had said, his lordship stated, that the accused knew what he was doing and knew he was doing wrong. His Lordship explained the rules in the *McNaghten case*, and said that he could not advise the jury that the rules applied to the present case. The jury nevertheless found a verdict of "Guilty, but insane." This verdict cannot be regarded as a freak decision, or as the result of a superstitious veneration for a medical invention, the significance of which the jury failed to understand, but as a considered rejection of the McNaghten rules when in accordance with the law as it stands to-day, it is sought to apply them to a case where there is conclusive scientific evidence of serious abnormality. The learned Judge advised the jury that they could add a rider to their verdict, possibly one of a recommendation of mercy. There can be little doubt that in the face of strong medical evidence of abnormality such a rider would have received most careful consideration by the proper authorities, but the jury seems to have been conscious of the same apparent defect in the McNaghten rules as that to which McCardie, J., impliedly referred in his summing up in the *Ronald True case.* (*The Times* 6th May, 1922) : "I shall put this point to you—that even if the prisoner knew the physical nature of the act and that it was morally wrong and punishable by law, yet was he through mental disease deprived of the power of controlling his actions at the same time? If 'yes', then in my view of the law, the verdict should be 'guilty, but insane'." There is, however, another view, put forward at its highest limit by the Lord Chief Justice in *R.* v. *Kopsch*, (1925) 19 Cr.App. R. 50 : "It is the fantastic theory of uncontrollable impulse which, if it were to become part of our criminal law, would be merely subversive." Greer, J., in *R.* v. *True*, 16 Cr.App. R. 164, seemed to lean to the view that uncontrollable impulse would bring a case within the *McNaghten rules* if a man's will power was so destroyed by mental disease as to destroy his power of knowing what he was doing or of knowing that it was wrong. The question is fraught with difficulty, but, as Greer, J., said in that case a man's mind is not divided into separate compartments, and it may well be that a solution can be found by a summing up on the lines indicated by that great judge in cases where there is scientific evidence of serious abnormality.—*S.J., 1943, p. 105.*

1. (1943) 1 M.L.J. 236.
2. (1943) 2 M.L.J. 454.
3. (1943) 2 M.L.J. 513.
4. (1943) 2 M.L.J. 121 (P.C.)

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Sir P. S. SIVASWAMI AIYAR.

We offer our hearty felicitations to Sir P. S. Sivaswami Aiyar on the attainment of his eighty-first birth-day. To the advocates of Madras the occasion is a particularly memorable one. Sir Sivaswami Aiyar is one of the founder members of the Madras Advocates' Association and has throughout his whole professional and public life exhibited a standard of integrity and adherence to principles seldom surpassed. To the junior members of the Bar, Sir Sivaswami Aiyar may not be a familiar figure as he left the Bar in 1912 in order to accept the high office of Executive Councillor. He is however a person who in many respects is a pattern and an exemplar to the profession. On retirement from office in 1917 (he was but 53 then) he finally put aside the idea of reverting to the Bar of which he had been such a distinguished ornament and decided to devote himself to public service. As a lawyer he had followed the highest ideals of professional etiquette and it was a fitting tribute which Sir S. Varadachariar paid when on the occasion of his taking leave of the Madras Bar he recounted one or two incidents from Sir P. S. Sivaswami Aiyar's professional life characterising them as "the high-water mark of professional idealism". In the words of the learned Chief Justice, while unveiling the portrait of Sir P. S. Sivaswami Aiyar at the premises of the Advocates' Association: "The Madras Bar has produced many great men but none can be deemed to be more deserving of a niche in the hall of fame than Sir P. S. Sivaswami Aiyar".

Sir P. S. Sivaswami Aiyar's public activities are too numerous to be recounted. As the Vice-Chancellor of two Universities, as a member of the Legislative Assembly at Delhi, and as a politician he has rendered yeoman service to the country. Simple and unostentatious he has always shunned the limelight of publicity. His achievements though not spectacular have an abiding value. He has been an ornament to the cultured society of Madras, a fine blend of eastern and western culture. His Kamala Lectures on the Evolution of Hindu Moral Ideals and his book on the Indian Constitution are marked by deep thought, keen insight and an accurate sense of values.

Sir Sivaswami Aiyar's life has been a well-regulated life in every way. He never rushed into any action without deep thought. He never sacrificed a principle. His benefactions have been considerable and striking and well conceived. He planned early and lived up to the plan.

Sir Sivaswami Aiyar has been associated with the Madras Law Journal almost from the beginning. It was started in 1891, and he joined the editorial board in 1893. His editorial comments on current legal events, his critical examination of decisions and his translations from original Sanskrit authorities have all been of the greatest value to the profession.

Sir Sivaswami Aiyar is still healthy and strong as few of his age are. It is our fervent prayer that he live long and attain the Vedic length of years and serve the country by his disinterested service and even more by his example.

AS THE BAR VIEWS IT.

The Bar feels that its interests have failed on many matters to receive adequate consideration at the hands of the authorities and that its wishes have not been taken due note of. It is proposed to refer here to one or two of such matters.

RECRUITMENT TO THE HIGH COURT BENCH.

Recruitment to the High Court Bench is a matter of the greatest importance from the point of view of the Bar. It has often been claimed that the judiciary in England stands pre-eminent in the world and that the English judicial system affords a model for others to emulate. The English Bar has, throughout its history, been famous for its independence and integrity and recruitment to the judiciary has been made exclusively from its ranks. In India the judiciary is no doubt modelled on the English system, but for certain reasons appointments to the Bench have continued to be made, in spite of the passing of more than eighty years and the changed condition of things since the establishment of the High Courts, not exclusively from the ranks of the Bar. Till the passing of the Government of India Act, 1935, one-third of the sanctioned strength of the Bench was to be chosen from judicial officers belonging to the Indian Civil Service. In the selection of the remaining two-thirds also it was not an unfamiliar practice to take on to the High Court Bench a member or two from the ranks of the Provincial Judicial Service. When the Government of India Bill was before the Joint Select Committee of Parliament, it was represented that the fixing by statute of any proportion of Judges as to be recruited from any particular class imparted unnecessary rigidity and was undesirable and that Judges should be selected from the ranks of the Bar only. The latter point was not conceded, though the Report refers in para. 331 to the existence of a feeling against recruitment of Judges from outside the Bar. Anyway one would have expected that with the growth of a strong and independent Bar in each province and the assimilation of English ideals and traditions and practice, there will at any rate be a progressive increase in the proportion of Judges taken from the ranks of the Bar. In Madras a different result seems to have now been reached. In the latter half of 1937 the proportion of Judges who had gone to the Bench straight from the Bar to the other Judges was 8: 6; in 1941, when two additional Judges were appointed the proportion was 8: 8; and at the present moment it is 6: 10. In the circumstances is it too much to ask that in regard to appointments to the Bench in future at least selection should be only from the Bar and not from outside the profession?

STATE OF THE LISTS.

Another matter that might be mentioned is as regards the desirability of publishing at the commencement of every term statistics concerning the state of the lists in the High Court. In England it seems to be done. Here also it is understood that such statistics are compiled for official purposes. No extra effort or expense is therefore likely to be involved in publishing in the High Court notice-boards such statistics. Such publication will be of great assistance to the Bar and will enable them to adjust their work. It will help the advocates to decide their own career in reference to it and above all it is desirable that the public should have correct figures in regard to litigation rather than be allowed to make comments on figures which may be inaccurate, or incomplete or perhaps conjectural in any degree.

JUDGES' SITTINGS.

The sittings of Judges is essentially a matter of administrative detail. In some courts the sittings seem to be announced as for a term; in others they are varied from time to time. It will certainly be undesirable to shift Judges from one class of work to another at very short intervals. But will not their continued retention in a particular class of work for long periods tend to produce a sense of monotony, and exclusion of some Judges from a class of work altogether? Will not a rotation of Judges not frequently but at convenient intervals avoid such a result? This is not a mere imaginative picture of people who have no experience. Judges who have been in the admission Court have been known to complain of the frequent shifting of attention from one case to another every day over long periods. Periodical shifting of the kind of work that a Judge has to do may keep his mind refreshed and fit, efficiently to perform its task.

RELATIONSHIP BETWEEN THE BENCH AND THE BAR.

We should like to invite the attention of our readers to the judgment of the Lahore High Court in *Hakumat Rai* v. *King-Emperor*[1]. It contains a lucid exposition by Din Mahomed, J., of the principles that should govern the relationship between the Court and the lawyers practising before it. The principles themselves are well-known but a remembrance of them in actual practice will be highly helpful, particularly where a slight tact, a little tolerance or the possession of a sense of humour either on the one side or on the other would ease a situation which otherwise may get tense. Approving the statements regarding this matter in Oswald and Wareville, the learned Judge points out that while "an over subservient Bar would be one of the greatest misfortunes that could happen in the administration of justice", at the same time, it should be remembered that a lawyer "should at all times pay deferential respect to the Judge and scrupulously observe the decorum of the court room". The learned Judge pertinently remarks that while it is true that a lawyer should always conduct himself properly in court and exert his best at all times to maintain the dignity of the court, "the court has also a reciprocal duty to perform and should be not only not discourteous to a lawyer but should also try to maintain his respect in the eyes of his clients and the general public with whom he has to deal in his professional capacity. Hypersensitiveness on the one side or rudeness on the other must be avoided at all costs. . . . . Mutual adjustment and not mutual antagonism should be the end in view on both sides, eliminating all ideas either of domination or of servility". As pointed out by Lord Atkin in *Debi Prasad Sharma* v. *Emperor*[2], in another context "judicial personages *can afford* not to be too sensitive" (italics ours). The rule framed by the American Bar is commended by Din Mahomed, J., in this respect, namely, that "a self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due to the Judge's station is the only proper foundation for cordial personal and official relations between Bench and Bar". The statement in Mr. Justice Sundara Aiyar's treatise on Professional Ethics at p. 99—"Without failing in respect to the Bench it is the duty of the members of the Bar to assert their just rights to be heard by the tribunal before which they are practising. They should be fearless and independent in the discharge of their duties: they would be perfectly right in protesting against irregular procedure on the part of any Judge, and if the advocate is improperly checked or found fault with . . he should vindicate the independence of the Bar" —is approved.

The observations of the learned Judge on two other matters may also be noted. On the question whether a remark made by a pleader in court as "an

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1. I.L.R. (1943) Lah. 791. 2. (1943) 2 M.L.J. 568, 570 (P.C.).

aside" to a brother member of the Bar which the Judge happened to overhear can be made the subject of an offence under section 228, Indian Penal Code, it is stated that "there is ample authority for the proposition that if a remark is not addressed to a court, however rude or vulgar it may be, it cannot be made the subject of an offence under section 228, even if the court happens to overhear it". How far a lawyer is an officer of court is also elucidated. According to the learned Judge, a lawyer is no doubt subordinate to the courts in so far as he is subject to their disciplinary authority, but all the same he is not a subordinate officer of the court like any other ministerial officer of the court; it is largely through the labours of counsel that Judges are able to dispatch the business of the court and to degrade him to the level of other ministerial officers working in the court is an entirely erroneous conception of the position he occupies.

In the case in question, in the course of a trial, a somewhat searching cross-examination had been made by the pleader for the accused, one of the prosecution witnesses having made certain prevaricating statements. The cross-examination was not however of inordinate length and the questions put were found to be not only relevant but most material. In adjourning the case the Magistrate made a remark to the effect that unnecessary questions had been put by the pleader who took exception by saying that he "resented" it. On the Magistrate requiring the pleader to reduce his protest in writing, which the pleader considered unnecessary, according to the Magistrate the pleader also observed that the Magistrate's remark was "improper". The Magistrate demanded an apology which was refused. The Magistrate directed the "detention in custody of the pleader" and took up another case. In the meanwhile a relative of the pleader and a respectable member of the place "possibly astounded at the order made against" the pleader sought to enter the court but was maltreated by the chaprasi. The pleader thereupon went forward to the Magistrate and protested against the treatment meted out to the gentleman. The Magistrate took this to be an interruption of his work, refused to listen to the pleader and directed him to resume his seat. The pleader remarked that that was "strange". Certain members of the Bar with a view to remove the misunderstanding approached both sides but with no effect. In reply to the lawyers who were urging him to withdraw the expressions he had used, the pleader remarked that he would not do so as he would like to make it "a test case". The Magistrate happened to hear the remark and at the end of the day called upon the pleader to show cause why he should not be proceeded against under section 228, Penal Code and in that connection examined him on all the points that in his view constituted contempt of court. At the conclusion of the examination and without recording any evidence the Magistrate wrote a judgment holding that the pleader had committed contempt in respect of the words used by him and sentenced him to pay a fine of Rs. 100. On appeal to the Lahore High Court the conviction was set aside and it was held that no contempt had been committed.

SIR WILLIAM HOLDSWORTH.

The death of Sir William Holdsworth removes from the legal firmament in England a star of outstanding scholastic brilliance. His monumental History of English Laws bringing up to date as it were the efforts of Pollock and Maitland in that direction in regard to the earlier centuries, was a work of no mean achievement. As Vinerian Professor of English Law at the Oxford University since 1922, as Reader in Constitutional Law and Legal History to the Inns of Court since 1937, as a systematic contributor to the columns of the Law Quarterly Review, he has achieved in the academic sphere a measure of renown which few could equal. Honours came to him fast and from far and wide. He became King's Counsel in 1920, and was a Bencher of Lincoln's Inn. He was elected a Fellow of the British Academy in 1922, and

was awarded the Ames Medal of the Harvard University in 1927, and the Swiney Prize of the Royal Society of Arts in 1934.

To Indians his name will be particularly familiar because of his membership of the Butler Committee on Indian States in 1928, and the Donoughmore Committee on Ministers' Powers in Ceylon, in 1930. Students of law in India will always remember him as Tagore Law Lecturer, Calcutta University, in 1938.

His death coming soon after that of Sir Frederick Pollock will cause a void in the ranks of jurists in England who had carved out a commanding position by reason of their great scholarship and erudition that cannot be easily filled up.

JOTTINGS AND CUTTINGS.

UNVEILING OF SIR ABDUR RAHMAN'S PORTRAIT.

A pleasant function took place, when Sir Lionel Leach, the Chief Justice, unveiled on Friday the 21st January a portrait of Justice Sir Abdur Rahman at the High Court in the presence of a large gathering of Judges and advocates. The portrait was the gift of the Madras Advocates' Association to the High Court to be hung in the Judges' portrait gallery.

In requesting His Lordship, the Chief Justice, to unveil the portrait, Mr. T. V. Muthukrishna Aiyar, the President of the Association, said:

"My Lord the Chief Justice,

On behalf of the Advocates' Association I have much pleasure in requesting your Lordship to be so good as to accept and to unveil the portrait of the Hon'ble Sir Abdur Rahman. Only the other day when the members of the Bar of this Court assembled together to wish that learned Judge godspeed in his new environments I spoke of his many qualities that endeared him to the profession here. I do not therefore propose this evening to dilate on them. I shall content myself with saying that when about a year ago he had to leave us mainly for personal and domestic reasons it was with genuine regret that the members of the Bar parted company with him. His fearless independence, his desire to get into the details of every case that came before him and his evident anxiety conscientiously to render justice between man and man were some of his outstanding qualities. Above all, his unfailing courtesy and his firm conviction that the members of the Bar were collaborators with him in the administration of justice made him one of us. Outside the precincts of the Court he was ever affable and social. He was quick to form friendship and had a happy knack of retaining it. It is some consolation to us however that this portrait of his will constantly remind us of the five happy years we spent with him.

I now request your Lordship to be so good as to unveil the portrait."

In unveiling the portrait, The Hon'ble the Chief Justice said:—

"Mr. President,

This is the sixth occasion on which it has been my pleasant duty to unveil the portrait of a Judge of this Court. If it goes on at this rate I think we will have to build a separate Judges' portrait gallery as there will not be sufficient room on the walls. Past experience has told me that there is really no need for a speech at the unveiling, as everything that is necessary is said by the president at the beginning and it is rather difficult to go on repeating.

I am sure you will agree that the photographer—it is not a painting, it is an enlarged photograph—has caught the learned Judge in that most charming smile which is so characteristic of him. Mr. Justice Abdur Rahman was appointed a Judge of this Court to fill the vacancy caused by the retirement of Mr. Justice Cornish. His appointment was gazetted at the same time as my appointment as the Chief Justice. I was sworn in during the long vacation and my first duty in the term was to swear in Mr. Justice Abdur Rahman and it was the first occasion on which we had the ceremonial which is now associated with the swearing in of permanent Judges of this Court.

Mr. Justice Abdur Rahman had a distinguished career before his appointment as a Judge. He did not confine his activities to the material side of his profession. He has done a great deal of good work outside it. He was from 1927 to 1934 the Dean of the Faculty of Law at the Delhi University and from 1930 to 1934, he was the Vice-Chancellor of that University. His services were recognised by His Majesty in 1934

when the honour of knighthood was conferred upon him and the University conferred upon him its degree of Doctor of Laws.

As you are all aware, Mr. Justice Abdur Rahman's transfer from this Court to Lahore High Court was only because the climate of Madras did not suit him. I know he regretted his transfer as we all did. Mr. Justice Abdur Rahman was in the true sense of the word a gentleman and as you all know, Lord Halsbury said that that is the first qualification for promotion to the Bench. He had the other requisite qualifications, namely, a sense of justice and an extensive knowledge of law. The statement of Coke that a good Judge judges according to what is right and good and prefers equity to strict law aptly describes the judicial outlook of Mr. Justice Abdur Rahman. As you know, the Bench over which I preside takes in its list all appeals from judgments of Judges of this Court and I can say that I have had to consider many of the judgments of Mr. Justice Abdur Rahman in appeals filed under the Letters Patent. Therefore I can speak with an intimate knowledge of his work, and I may say that I formed a high opinion of the care and learning which he brought to bear on his pronouncements.

His transfer to Lahore meant a great loss to this Presidency, but he is now dispensing the same measure of justice in a climate more suitable to him than the climate of Madras and we wish him every good wish. At the same time I cannot avoid saying that I would sooner have him here than his photograph, but as we cannot have him here we must be content with his photograph which will always remind us, if reminder is necessary, of his presence among us as a great Judge with a spirit of kindliness and one who always strove to do justice and succeeded.

I will now perform the pleasant duty of unveiling his portrait."

Autrefois Acquit.—What was stated to be an entirely new point on the law of "*autrefois acquit*" came before the Recorder of Bournemouth on 4th October (*The Times*, 5th October) in *R.* v. *C. R. Browne*. The accused had pleaded "Not guilty" to charges of obtaining by false pretences two separate sums of £5 from branches of the Midland Bank. He had previously been committed at the Hampshire Quarter Sessions last April of two similar offences, and had then admitted and had had taken into consideration the two offences with which he was now charged, together with five others. He received twenty months' imprisonment for all these offences at the April trial, but on appeal both the conviction and the sentence were quashed. At the trial at Bournemouth counsel for the accused argued that because there had been a previous conviction, and alternatively because there had been a previous acquittal on the two charges now before the Court, the accused could not be put in peril of a conviction again on the same charges. A jury was accordingly empanelled to try these special pleas, and in his direction to them the learned Recorder stated that it was a principle of law that a man could not be put in peril twice in respect of the same offence. The Court of Criminal Appeal had said nothing with regard to the outstanding charges, and it was unnecessary that they should, because the sentence which they quashed was for the two offences of which he had been found guilty at Winchester. It was assumed that that sentence was increased by the taking into account of the outstanding charges, but the outstanding charges were only taken into account as subsidiary matters, and went by the board entirely when the sentence was quashed. The Recorder advised the jury that they ought to find that, whether the plea was one of *autrefois convict* or *autrofois acquit*, the defence had failed to make out the plea on either of those two charges for which the defendant was indicted. The jury nevertheless found that the accused had been previously convicted. The rule that "a man may not be put twice in peril for the same offence" is "an established rule of the common law" (2 Hawk. c. 35). The jury in the present case came to the conclusion that there had been a previous conviction, but that cannot be right, as the power of a court to take into consideration other offences admitted by the accused relates only to sentence and not to conviction. He was never convicted, nor having admitted the offence, could he be said to have been acquitted. On the other hand, he certainly was in peril of imprisonment in respect of the offences, which were taken into consideration in awarding the sentence on the conviction which was subsequently quashed, but he was put in peril by his own voluntary act, a fact which seems to take the case out of the common law rule. —*S.J.*, 1943, *p.* 366.

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SECTION 403, INDIAN PENAL CODE—A MISPRINT.

We have received a communication from the Additional Secretary and Draftsman, Government of India, Legislative Department (Mr. J. Bartley) drawing our attention to a strange misprint occurring in the official reprints of the Indian Penal Code issued in 1909 and thereafter, and which possibly occurs also in earlier re-prints. The letter states:—

"The third and last paragraph of the second Explanation to section 403 of the Code, as passed by the Legislature, runs:—

'It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it; it is sufficient if, at the time of appropriating it, he does not believe it to be his own property, or in good faith believe that the real owner cannot be found'.

At some subsequent reprinting of the Act the underlined word was re-produced as 'believes'. The result is to convey the opposite of what the Legislature really enacted."

It is quite likely that in many of the annotated editions of the Penal Code, which naturally would have adopted the official version of the text of the Code, the mistake has been reproduced, as in fact it has happened in some of the books, as Mr. Bartley's letter points out. Now that the error has been brought to light we are sure that the necessary correction will be made by our readers in their copies.

MITAKSHARA JOINT FAMILY LAW—ALTERATIONS SUGGESTED.

A member of the Madras Judicial Service writes to us:

"The institution of joint family under the Mitakshara school of Hindu law has outlived its useful purpose, and at the present day it is a source of heart-burning and costly litigation. The health of any system depends on its ability to get rid of such waste matter speedily. Hence Hindu society should get it abolished by legislation, as courts look only to precedents, the earliest being considered to be the best. Legislation cannot and need not put an end to the joint family itself but it can put an end to some of the harmful legal incidents thereof, such as (1) survivorship, (2) pious obligation to pay one's father's debts, (3) capacity of a father or manager to contract debts and to alienate properties so as to bind other major persons even against their wishes.

I propose the following as model sections, of course to be improved upon by more capable hands.

(1) 'On and after (a fixed date) members of joint families governed by the Mitakshara school of Hindu law shall be entitled to their respective shares in joint family property in severalty as tenants-in-common and not as coparceners or as joint tenants.

(2) 'Debts contracted and other financial obligations incurred and alienations of property made on and after (the fixed date) by any member of a joint Hindu family, even if he is a manager or father, shall not be binding on the shares of the other members of the family in joint family property except under the law governing guardians and their wards and principals and agents'."

The Mitakshara joint family system has had shattering blows dealt to its integrity in the past, both by legislation like the Hindu Gains of Learning Act (XXX of 1930) as well as under case law countenancing theories like the doctrine of unilateral declaration leading to a severance in the joint status, the alienability by a co-parcener of his undivided share in Madras and Bombay, for value, etc. In regard to the doctrine of pious obligation also there have been changes making it more suitable to modern conditions. In the words of Coutts Trotter, C.J., in *Achutan* v. *Ratnaji*,[1] "it has been controlled and moulded into shape by a series of decisions which . . . . . . make it a working rule which in its actual application is neither inconvenient nor unjust". No doubt in a later case, *Subramania* v. *Sabapathy*[2] the same learned Chief Justice expressed the opinion that the doctrine is an illogical relic of antiquity unsuited to any but a primitive and patriarchal society, but in fairness it has to be noted that the remark was made in connection with what he thought was an attempt at extending the scope of the doctrine. Anyway the doctrine is a logical sequel to the theory of right by birth and so long as the latter principle rules there will be nothing illogical in retaining the pious obligation rule also. One thing is clear, that Hindu law ought not to be changed piecemeal by periodical nibblings at it. As regards the abolition of a manager's power to sell in the way proposed, such a change in the law might require re-adjustment of the principles regarding liability of joint family property for maintenance, marriage expenses of the unmarried female members of the family, etc. Now that a special committee has been constituted to examine the entire Hindu law with a view to its codification we are sure that suggestions like those made *supra* will receive the fullest consideration.

WHEN STATE SHOULD BE LIABLE FOR COSTS.

Interesting suggestions were made by Mr. Roland Marshall, President of the Incorporated Law Society, Liverpool in an address delivered by him sometime back to that society. One of them was that where a litigant wins in the first Court but loses on appeal it is not fair to make him bear the entire costs; it is rather the state that should bear the costs of the first Court. The suggestion seems to proceed on the view that the reversal of the first Court's judgment is in the ultimate analysis attributable to some failing of the state, probably in not selecting a person whose opinion will always be sustained on appeal. Even Homer nods and it is very doubtful whether the public will ever reconcile themselves to the state paying the costs of what after all is the result of ordinary human fallibility.

Another proposal was that the costs of litigation relating to the obtaining of decisions on doubtful or obscure points arising under statutes should be borne by the state on the fiat of the Attorney-General and subject to proper safeguards and that the same procedure might be applied to litigations of general public importance. It is interesting to re-call in this connection how in *Roe* v. *Russel*[3], Scrutton L.J., regretted that he could not direct the costs in that case to be paid by those responsible for the drafting of the Act there in question and its passing. That the costs of litigation are heavy has often been stated. The desirability of reducing the same has also been conceded. It must go some way towards such reduction if at least in the cases where questions of public importance or construction of doubtful statutory provisions are involved the state could bear a share of the costs as suggested by Mr. Marshall.

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1. (1925) 50 M.L.J. 208: I. L. R. 49 Mad. 361 (F.B.).
2. (1927) 54 M.L.J. 726: I. L. R. 51 Mad. 211.
3. (1928) 2 K.B. 117.

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THE WAR AND LITIGATION.

The war seems to have brought about in England a slump in litigation generally, though in particular directions cases have shown a tendency to increase. Cases arising out of factory accidents, divorce cases, and petty crimes, have increased but not cases arising out of contracts, shipping, mercantile transactions, etc. A contribution to the columns of the "Spectator," under the caption "Courts and the War", appearing in its issue of the 31st December, 1943, on p. 617, by Ambrose Hoopington which is extracted below, explains the reasons for the slump. The causes are chiefly the changed conditions of English life and the psychological effect of the war on the average citizen. Mr. Hoopington attributes the fall in litigation to the war being fought on "deflationary lines", to the imposition of state control in various directions very early in the war, to the absence of any rapid rise in prices and to the realisation by the lawyers that the war is not something alien to them leaving them free to carry on their business as usual regarding it as a sort of boom like any other boom out of which they can make a profit and that it was not very far from their doors and as such required every man's serious attention. How the war conditions have affected lawyers in regard to their professional work in this country is yet to be correctly assessed. Even before the outbreak of the war, litigation in this Presidency seems to have shown a tendency to decline, a tendency which is being kept up according to the statistics recently published in a local newspaper, though as far as the High Court is concerned the year 1943, showed the heaviest filing for the last decade. In our country also, state control has been at work in several directions. Prices have however risen heavily in certain cases and it is only comparatively lately that a restricted system of price control has begun to operate. Conditions in India may not afford an exact parallel to what they are in England; albeit, Mr. Hoopington's analysis may not be without value in studying the effect of the war on litigation in countries directly involved in fighting.

Mr. Hoopington wrote:

"Some twenty years ago men who had just been called to the bar were apt to say cynically that nothing but another war would ever get them a practice. The remark was prompted by seeing most of the work in the hands of youngish men who had conspicuously not served in the Forces and had flourished accordingly. It is fair to barristers to say that the present war, when it came, was not hailed by them with enthusiasm, and anyone who looked forward to it as a means of enriching himself must have been disappointed. The war has brought a slump rather than a boom in litigation. Though the number of barristers available is greatly reduced, not many of them are flourishing, and the few who are busy are mostly engaged in cases of no great magnitude. It is true that some branches of the law are still fairly active. It is generally said that there is plenty of work on circuit, though not in London. It may be that the evacuation of London early in the war * * * * had

some effect in moving work out, but for the most part the work which keeps the Judges of Assize busy is not high-grade litigation. It is the kind of business which is bound to arise when numbers of young soldiers are encamped in a strange locality with time on their hands. * * * * There are also criminal cases arising out of the home front—particularly black market prosecutions and other breaches of the Defence Regulations. Similar work is to be had in London also, but as legal work there is more specialised, it does not affect the ordinary common law barrister or fill the ordinary law Courts. * * * * In all factory areas there is a distressingly large number of cases arising out of factory accidents, for in war-time conditions machinery is old and the operators are new to it.

It is easy to account for the absence of many types of work. The Prize Court which was a feature of the last war is non-existent, partly from changes in policy, partly because there are no neutral countries between England and Germany. Running down cases, which provided a large portion of pre-war litigation, have decreased with the number of cars on the roads. Breach of promise and libel actions are also at a discount; they flourished largely on newspaper publicity, so there is less reason now for bringing them, and the absence of a jury has also a damping effect. * * * Cases between landlord and tenant, at any rate so far as the County Court is concerned, have almost come to an end. And, of course, all cases are impeded by the difficulty of securing witnesses; who may be fighting in Italy or prisoners of war in the Far East.

But something beyond these partial causes is required to explain the present slump. The main fact is that this war, unlike the last, is being fought on deflationary lines. So far as the direct effect on the law is concerned, the military service tribunals which provided so much legal work in the last war never came into being; enemy aliens also were not allowed to be legally represented at their tribunals; and the whole 18-B procedure is designed to cut out lawyers. The same applies to Government action under other Defence Regulations. It is all part of a process by which the State—one hopes, only temporarily—has gone totalitarian. The cases in which an attempt has been made to question State control have been comparatively few and ineffective. The same process is at work higher up, to nip litigation in the bud. It is irrelevant that actions may still be brought on contracts if contracts are so strictly controlled by the State that there is nothing to litigate about. In other words, for the lawyers, as for many other classes who flourished twenty-five years ago, State control was in this war imposed too soon. There has not been the same rapid rise in prices encouraging everyone to break his contract and trust that the war provides him with an excuse for doing so. Those who try to make a real profit out of it become not mere profiteers but black marketers, and find themselves in the dock if they are caught.

Solicitors are extremely busy. This is not inconsistent with an absence of litigation. To some extent it is even a cause of it. The average respectable solicitor only lets his client go to law when it is inevitable. A case in Court is a casual interlude in a business which consists of conveying property and drafting deeds, winding-up estates and managing trusts. This kind of work is not lessened by the war, and it has to be carried on with a greatly reduced staff. Many solicitors now carrying on fairly good practices, with no one but girl typists to help them, find themselves compelled to refuse to undertake work, particularly if it means conducting litigation. In some cases their client may go elsewhere, but more probably the action is dropped or is settled on any terms to avoid the trouble.

And that brings one to what is perhaps, after all, the principal reason for the dearth of litigation—the psychological one. In the last war the majority of solicitors and most of their important clients had been brought up in the Victorian tradition to think of war as something utterly alien to them. Moreover, the fighting was at some distance from their doors. Their natural instinct was to carry on much as they had done in peace-time and treat the war-time boom, just like any other boom, as an opportunity for making money. Nowadays the average solicitor is a man who served in the first German war or, even if he was exempted from the actual fighting, has grown up with the idea that a war is an event which interferes with normal life and is more important even than legal business. He may quite well have given up practice altogether and taken some government job. But even if he has not done this, he accepts the fact that conditions are not normal; he makes no great effort to stop his employees going to this war, as he himself went to the last war; and he is prepared to advise his clients that in war conditions they must expect to put up with some injustice, and, indeed, he will feel some patriotic hesitation in starting litigation with the war going on.

It may be added that there is probably less litigation now than there was a year ago. This is easily intelligible. A year ago people had got used to the war, and were beginning to carry on their affairs on an accepted war basis. Now victory seems at last to be within sight, and everyone is letting his cases wait till after it is all over."—*Spectator, 31st December, 1943, p. 617.*

LAW OF INSURANCE

BY

C. UNIKANDA MENON, ADVOCATE, MADRAS.

I

Ancient origin.—Insurance is of ancient origin. It dates back to the 4th century B.C. Insurance is closely connected with commerce and civilization. It gives stimulus to commerce and industry, and all civilized and industrial countries, whether ancient, mediæval or modern have adopted insurance of some form or other.

Controversial subject.—"Insurance is a controversial subject[1] in economic literature." Does insurance really contribute to the economic prosperity of a nation or does it tend only to profit enterprising adventurers who float insurance companies to dupe the credulous public? In companies started under strict state control, as under the Indian Insurance Act (IV of 1938), the scope for public fraud is reduced to a minimum, as the provision for deposit sufficiently guarantees the stability of the company.

Necessity for insurance.—In one sense, it might seem that insurance is a superfluity to the prudent. But the most prudent and the most cautious are overtaken by the inevitable incident of death, perhaps at a time when his life would be most useful. Unexpected calamities such as fire or cyclone might damage a factory or wreck a ship.

The advance in scientific knowledge has contributed not a little to the increase of risks in every department of human activity which in turn increases the need for insurance. The risk in business is greatly increased by the development of modern technology. The risk to life is increased by the dangerous speed in modern forms of conveyance.

Capitalism has made specialisation the order of the day, for capital necessitates the employment of machinery for getting the fullest benefit out of the capital.

> "The application of machine to industry leads to specialisation of human workers. A machine is a specialised tool. It is confined to a single process or a narrow range of processes. . . . By being forced to specialisation, he is forced to incur the risk of specialisation. The highly specialised workman is in the same position as the capitalist who has invested his capital in a highly specialised machinery. His skill has only a limited field for employment and loses its value outside that field."[2]

But insurance has created in the specialist a sense of security and has thus enhanced the productive energy.

Kinds of risks.—Risks the effect of which is considerably alleviated by insurance may be divided into three groups: (1) Natural, created by the play of natural forces, such as death, cyclone, *vis major*, etc.; (2) Business risks arising out of the existing conditions of capitalist society such as strikes, etc.; (3) Artificial risks, created as the expression of gambling, lotteries, etc. With the third kind of risks, insurance has no concern and all countries have now declared unlawful, insurance on any kind of gambling.

Guiding principles.—There are certain guiding principles for the determination of the liability of risks. The risk and loss must not be in the power of the insured to hasten, in which case the temptation to earn the premium himself or to give the benefit of it to the persons entitled will tempt him to hasten it. Secondly, a large number of cases must be exposed to risk, otherwise there will be only few persons tempted to insure and the premia paid by them will not be sufficient to pay all the sufferers. Thirdly, the probability of the occurrence must be regular and common. It will not do if it happens once in a way. Fourthly, the loss must be important enough to be provided against, as otherwise the loss may be ignored and no attempt

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1. *Vide* "Co-operative Insurance" by N. Barou.

2. Economics by Henry Clay (1930); pp. 26 and 46.

to recoup it by insurance will be attempted. Lastly, the cost of the cover must not be prohibitive. If that be so, that is, if the premium that has to be paid is much more than the amount insured for, there may not be many willing to insure.

There is not a single branch of human activity that may not be insured, provided the assured has an interest in it. There are, for example, Marine Insurance, Life Insurance, Fire Insurance, Property Insurance, Business Insurance, Fidelity Guarantee, Burglary Insurance, Workmen's Compensation Insurance, Co-operative Insurance, Live-stock Insurance, Motor Insurance, Aviation Insurance, etc. An attempt to classify them is difficult. The classification may be according to (*a*) the object of insurance (personal or property), (*b*) conditions of participation (voluntary or compulsory), (*c*) status (public or private), (*d*) legal form (limited company, mutual or co-operative, (*e*) aim (public interest or profit making), (*f*) unit insured (individual or group), (*g*) method of premium payment (fixed or levy system).

History of insurance.[1]—The law of insurance begins its history from remote antiquity. Traces of it existed amongst the ancients, the Greeks, the Romans, the Babylonians and the Hindus. That Romans employed some system of insurance between 300 B.C. to 1000 A.D. is evident from certain references in Latin authors and in the *Corpus Juris Civilis.* In Livy XXIII 48 and 49, there is a reference to scipios in Spain applying in 215 B.C. to the Senate to send food and clothing as otherwise neither the army nor the province could be retained. The Senate applied to the farmers of revenue to arrange a contract for the supply. Three companies agreed to supply on condition that all risks of loss arising from the attacks of enemies or from storms, of supplies which they placed in the ship should be borne by the state. This demand was agreed to by the Republic and the goods supplied.

The next reference is about 160 years later and is found in the letter of Cicero to Caninus Sallust. Cicero after conquering the rebellious tribes in Cilicia, says that he expects to receive guarantees at Laodicea for all the public money (or treasure) in order that both he and the state may be protected from danger of loss in transit. (*Ciceronis Epistolae Ed. Christianus Godoir, Schutz, Hala,* 1808, Vol. III, p. 267). This passage renders it clear that there existed certain men in Laodicea willing to guarantee the state and Cicero against loss of the public money arising from dangers *en route.*

Next, in the life of the Emperor Claudius by Suetonius, there is a reference to passages to the effect that there was famine in Rome, and there was popular agitation against the Emperor and the Emperor in order to persuade the importers to render a most necessary service to the state offered to pay a fixed bounty on all the corn they imported and further agreed to be personally responsible for all losses arising from storms.

In all the above contracts, the payment of premium has to be necessarily inferred, since there could be no contract in Rome without consideration.

There are in the Digest certain decisions indicating that contracts were made for the insurance of valuable property. For example, Digest XLV Lit. I, Frag. 67.

There are indications to show that life insurance was also known to the Greeks and the Romans, the latter copying it from the former. Romans knew some form of Life Insurance Societies. Life Insurance Societies, as known in the ancient and mediaeval times, may be divided into two classes (1) mutual and (2) non-mutual or proprietary, the former being much older and probably the direct ancestor of the latter.

Mutual insurance societies.—Every Roman, if he is to have the privileges of a citizen, should have a particular sacra, that is, he should be within a particular gens, worshipping a particular deity. If he happens to fall outside the gens, he is not entitled to the sacra of the Roman ; he is a social ostracist, without even getting a burial in the common burial ground. In the early days of the Republic, foreigners,

1. *Vide* Early History of Insurance by Dr. Trennery.

freed-men, slaves or persons expelled from the family did not belong to any particular gens and they formed societies to worship a particular deity, to hold festivals in its honour, and to acquire and possess a common burial ground for the members of the society. To provide funds for expenses, monthly subscriptions were levied from the members. Later on they drifted from the religious beliefs of earlier days and developed these societies into line with mutual no-profit assurance companies and introduced the custom of paying the relations of the deceased a sum of money known as *funeraticum*, instead of providing him with a funeral, that is, these funeral clubs became practically a mutual insurance business concern. These mutual insurance societies were divided into three classes: (1) civilian, (2) veteran and (3) military.

It has now been found that these Roman societies were modelled after the earlier Greek societies, namely, Thiasoi, Orgeones and Erenoi—the first two being strictly religious and the third combining with its religious observances provisions for loans for members on exceptionally favourable terms, all the three having been carried on for mutual co-operation.

There is evidence to show that the Babylonians and Phoenicians used the Respondensia and Bottomry Bonds as a sort of insurance to goods and ships sent by the sea. That the ancient Hindus also knew of a form of insurance is evident from the Manava Dharma Sastra. Its date of compilation is considered to be between 200 B.C. to 200 A.D. *vide* Numbers 156 and 158 of Book VIII.

During the mediaeval times, in the records of the Flemings, Manapians and West Germans, there is evidence of the growth of mutual insurance against loss from fire, ship-wreck, misfortune, captivity, and damage to livestock. There is also evidence of the origin and development of non-mutual insurance of property of merchants, of non-mutual marine insurance and of life insurance, between the twelfth and the sixteenth centuries.

In Holland contracts of insurance had become very general during the sixteenth century. In Antiquis, Title XXIX it is stated that it has been the custom from "all old times" to make contracts of insurance on ships, merchandise sent by land or by sea and also on the lives of persons and further that this making of insurance is authorised.

In Italy, there are traces of marine insurance from the fourteenth century. In 1442 Ussano, the Florentine merchant quotes rates of insurance for goods during transit from London to Pisa by sea and land.

In Portugal, according to the chronicles of king Ferdinand about 1375, reciprocal insurance was well known at that date. There is also a record of the existence at Oporto of a chamber of insurance against charges, etc., on Portuguese shipping in the latter part of the fourteenth century.

In Spain, ordinances were issued by the Magistrates of Barcelona in 1435.

In England, it is evident, from the rates quoted by Ussano in 1442 for the insurance of goods between London and other ports that the London merchants must have known the practice. This is supported by the fact that the greater part of the London banking business was in the hands of the Italian bankers and that there were many Italian merchants trading in London during the fifteenth century. Lord Keeper Bacon is reported to have said in 1558: "Doth not a wise merchant in every adventure of danger give part to have the rest assured?" The first English statute of insurance appeared in 1601. Its language contains evidence of antiquity of the custom: *Vide,* "Whereas it hath been time out of mind an usage amongst merchants both of this realm and foreign nations . . ." In respect of the practice of insurance in England, there is no evidence of its existence at an earlier date than that quoted above with the exception of a reference to the mutual obligation of the provision for *wergild* in the time of the Anglo-Saxons, and a reference

contained in the laws of Athelstane to a form of mutual insurance against loss of cattle which was practically equivalent to that known as *Hamelinghe* which provided that each one shall pay one penny into the common fund within twelve months in order to repay the owner for the animal.

According to the law of England and the usage of merchants any person might be an insurer, however unable he might be to make up the loss insured against, provided the assured was weak enough to trust him. Many traders were deceived of their premia by many an insurer with a show of great wealth but in really insolvent circumstances. So Parliament passed an Act, statute, 6 Geo. I, c. 18, by which it authorised His Majesty to grant the charter to two distinct companies or corporations for insurance of ships and goods going to sea, with a common seal, capable of suing and being sued, directing that they should keep a sufficient stock of ready money to satisfy and discharge all just demands. By virtue of that Act, two offices under the names of the Royal Exchange Assurance Office and the London Assurance Office were created by the charter of George I. The Act did not deprive the private under-writer of the liberty of insuring to any amount with those who were prepared to trust to their private securities only. The first Joint Stock Companies Act was passed in England in 1844. A Joint Stock Company under statute 7 and 8 Vict., c. 110, Section 2 included every insurance company or association (including Friendly Societies making insurances to an amount not exceeding £200), whether such companies, associations or societies be joint or not. In 1862, the English Companies Act[1] was passed and that Act applied to all companies including insurance companies. In 1868, two big insurance companies, the Albert Life Insurance Company and the European Assurance Society failed and the confidence of the public in insurance was rudely shaken. To safeguard the interest of the policy-holders, the first Life Assurance Companies Act was passed in 1870[2], followed by Amending Acts in 1871[3] and 1872[4]. By these statutes, every company carrying on life insurance business in the United Kingdom had to deposit a sum of £20,000 in the Court of Chancery as a security for policy-holders. By the Assurance Companies Act, 1909[5], the earlier insurance companies Acts were consolidated and applied to all persons whether corporate or incorporate not being registered under the Act, relating to friendly societies or trade unions, whether, established before or after the commencement of the Act and whether established within or without the United Kingdom and doing business of all or any of the following classes: (*a*) Life Insurance, (*b*) Fire Insurance, (*c*) Accident Insurance, (*d*) Employers' Liability Insurance, (*e*) Bond Investment Insurance and (*f*) Motor Vehicle Insurance. Every insurance company was required to deposit or keep deposited with the Post-master General for and on behalf of the Supreme Court £20,000 for every insurance business as a condition precedent to the Registrar issuing a certificate of incorporation.

Insurance in India.—In India, the provisions of the Indian Companies Act (VI of 1882) governed insurance companies till the Indian Life Insurance Companies Acts V and VII of 1912 were passed. The latter applied to all Life Insurance Companies operating in British India. The provisions of those Acts followed as closely as possible those of the English Assurance Companies Act of 1909, the only deviation from that Act being that no provision was made to regulate companies other than Life Insurance Companies, as at that time very few Indian concerns carried on business other than Life Insurance business.

With the growth of insurance habits, there had grown up Indian concerns formed with the object of carrying on business in Fire, Marine, and other kinds of insurance and the incentive came after the Great War of 1914-18. It then became necessary to bring in the law of the country in line with the law in force in other countries and provide for the classes of insurance businesses which had been omitted

1. Stat. 25 & 26 Vict. C. 89.
2. Stat. 33 & 34, Vict. C. 61.
3. Stat. 34 & 35, Vict. C. 58.
4. Stat. 35 & 36, Vict. C. 41.
5. Stat. 9 Edw. 7 C. 49.

from the Act. The experience gathered from the working of the Indian Life Assurance Act also showed that amendments were required in the existing statute in several directions.

The Insurance Act of 1938 neither adopted the English principle of minimum control, nor the Canadian practice of direct control by the State. It increased the supervision exercised over all concerns transacting insurance business in British India, whether indigenous concerns or foreign companies represented in India by branches or agencies. The Act did not deal with the substantive law of insurance. It only dealt with the law of procedure.

Indian Insurance Companies under Act IV of 1938 *as amended by Act XIII of* 1941.—The Insurance Act (IV of 1938) effected considerable improvement on the old law and gave great stability to insurance companies and much security to policy-holders.

Criticism of the Act.—It has been observed : "The whole Act bears the stamp of amateurish handling of a technical subject; there are many imperfections in the actual drafting of the clauses ; we can only say that it is far from being satisfactory."[1] There are in fact many glaring defects which militate against the real interest of Indian insurance.

(1) One great mistake that has been made is in not keeping General Insurance distinct from Life Insurance. (2) The second glaring provision is that the post of superintendent should be occupied by a qualified actuary. There is no real reason for such a provision, as the superintendent's duty will be mostly executive and the person who occupied it should be a person with great executive abilities. An actuary has nothing to do with General Insurance, and very often, actuaries are persons with specialised knowledge of certain departments of Life Insurance and do not concern themselves with the executive or administrative side, or the side concerning the organisation of Life Insurance Companies. (3) Another great defect is the absence of any provision for giving any sort of protection to the General Insurance companies, against Foreign Insurance companies in India. (4) Another great defect is the provision regarding the investment of funds, contained in sections 27 and 85, that 55 per cent. as regards Life Insurance Companies and 50 per cent. as regards provident societies should be invested in Government or other approved securities. The approved securities are defined to include Provincial loans, Port Trust, and Municipal debentures of the four major Port towns. The Government securities are not a desirable investment, for, during a war (as is the case in the present war) and other national crises the Government securities drop enormously in value, meaning thereby a great loss of capital. In all the leading countries of the world, the investments of an insurance company are distributed among government securities, mortgages on real properties, stocks and debentures of Railways, Agricultural and Land Mortgage Banks, buildings, and other real property and shares of approved public utility companies. Spreading the investments on such a broad basis can be the only way in which security can be given to the policy-holder. The narrow margin for investment as permitted under the Act will necessarily reduce the yield of interest which would mean a corresponding reduction of bonus to the policy-holder. The companies are faced with this alternative, that either they will have to increase their rates of premium or do away with the bonus altogether. Further this provision of compulsory investment makes it almost impossible for insurance companies for any help being given to the starting of new industries. The insurance companies all over the world have been largely instrumental in developing various industries. They are custodians of the surplus wealth of a country and thus they are in a position to make long term investments with no fear of a run being made on them.

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1. *Vide* Presidential Address of K. Santanam delivered at the 10th annual general meeting of the Indian Life Assurance Offices Association held at Lahore on 15th March, 1938, in Indian Insurance Manual, March 1938, p. 531 at 532.

All the same the present Act is a great improvement on the Act of 1912 in constituting a department of the Government for insurance under a superintendent, in making regulation for registration of companies and in providing for deposits to forbid the formation of insufficiently financed companies, in compelling the British and foreign companies to file periodical returns, in prohibiting loans to directors, etc., and in granting powers of inspection and investigation to the superintendent.

Suggested amendments to the Act.—As long as insurance companies remain private, conducted for individual profit, the safeguards under the new Act will be insufficient to protect the interest of the policy-holders. Further it is possible that during national or international crises, the value of "securities" on which the assets of the company are invested might fall in value, or "deposits" made in the Reserve Bank might prove insufficient to meet too many sudden simultaneous claims. To avoid ruin of the policy-holders and the local insurance companies, the Act should be so amended as to render help to those local companies by other insurance companies in India, carrying on the same kind of insurance business, making provision in the amendment Act for giving the latter companies a percentage of the premia of the former from the dates of their foundation.

Also, nationalisation of insurance companies is the only sure and certain way of saving the policy-holder from loss or ruin. Nationalisation of insurance is not unknown to India. An instance of it is found in British India in the Government Postal Insurance, confined only to Government servants, voluntary in character. In the Indian States of Mysore and Travancore, National Insurance is tried and exists and is only voluntary in nature. Every labourer should be encouraged and compelled to take out an insurance policy, the state also contributing a portion towards it.

II

The general principles of insurance law.—The Indian Insurance Act of 1938 does not purport to deal with substantive law; and it has to be ascertained from English law. The general principles of insurance law apply, with few exceptions, equally to all kinds of insurance and such differences as exist are to be attributed, as a rule, not to a difference in principles to be applied, but rather to a difference in their mode of application.[1] Except in life insurance and accident insurance indemnity is the controlling principle in insurance law.[2]

Contract.—A contract may be concluded between the parties or their agents duly authorised. A proposal form is issued by the insurers. The name, age, occupation of the assured, description of the subject-matter stating its particulars, the sum insured and answers to specific questions should be inserted in the form. The proposal is complete when the form is filled up, signed and transmitted by the proposer to the insurers or his agent. Very often to give interim protection to prospective insurers during the time taken to decide whether they are to accept or reject the policy, what is called a "cover note" in Fire Insurance or "slip," in Marine Insurance is issued to them. Insurers might indicate the acceptance of the proposal either by issuing the policy or by accepting the premium or by other conduct. It was held in *Xenos* v. *Wickham*[3] that a policy 'signed, sealed, and delivered" is complete and binding on the party executing it, though, in fact, it remains in his possession, unless there is some particular act required to be done by the other party to declare his adoption of it and that it is not necessary that the assured should formally accept or take away a policy in order to make the delivery complete.. It was further held that it is no part of the ordinary duty or power of a broker to cancel agreements once validly and completely entered into.

The terms of the contract are generally embodied in the policy. There is no magic in the word "policy". In substance, the term seems to cover a contract

1. Otto Barry's Fire Insurance, p. 5; *vide* also *Thomson* v. *Weems*, (1884) 9 A.C. 671, per Lord Blackburn.

2. *Wilson* v. *Jones*, (1867) L.R. 2 Ex. 139, 150. *Per* Blackburn, J.

3. 2 Eng. and Irish App. 296.

of insurance.[1] "A policy ought to be so framed that he who runs can read. It ought to be framed with such deliberate care, that no form of expression by which, on the one hand, the party assured can be caught or by which, on the other, the company can be cheated, shall be found on the face of it."[2]

Rules of construction.—The rules of construction of a policy are the same as those that govern the construction of a deed. Terms are to be understood in their ordinary popular sense, unless they have acquired a technical meaning. The policy should be construed in a liberal sense for the benefit of trade and the insured.[3] In case of ambiguity, the policy should be construed against the company. A policy should be construed in accordance with the law of the domicile of the insured.[4] The policy is to be governed by the law of the place where the contract is made.

Rectification and cancellation.—If the policy is discovered not to set forth the real terms agreed upon by the parties, it may be rectified by act of parties or order of Court. Policies induced by misrepresentation, fraud, non-disclosure or concealment may be cancelled like any other contract. Material alterations in the policy when it is in the control of the assured avoids the policy.

Condition and warranty.—"All policies contain a certain number of conditions declaratory of the terms and limitations under which the policy is granted and the duties of the assured and to some extent imposing duties on him in excess of those implied by law. Some such conditions are conditions precedent to the effectual making of the contract and if they are not satisfied, the policy does not take effect at all. Others presuppose the contract but are precedent to the accrual of a right to sue thereon. Others declare events on the happening of which all rights under the contract are forfeited. Others deal with the mode of settling disputes; others limit the period for bringing a claim."[5] Lord Blackburn said, in *Thomson* v. *Weems*[6]: "In policies of Marine Insurance any statement of fact bearing upon the risk introduced in the written policy is to be construed as a warranty and compliance with that warranty is a condition precedent to the attaching of the risk."

Description as to the use to which a vehicle was to be put is more of a description of the character of the risk than a warranty that that particular use and no other is the one to which the vehicle is confined[7]. *Vide* the recent case, *Provincial Insurance Co.* v. *Morgan*[8]. In a recent case in *Palatine Insurance Co., Ltd.* v. *Gregory*[9], timber belonging to the respondent was insured by the appellants against fire while in a timber yard. The policy contained a clause: "Warranted by the assured that a continuous clear space of 50 feet shall be maintained between the timber hereby insured and any saw mill . . . and 300 feet between any refuse burner." This clause was not one of thc conditions in the policies provided by the New Brunswick Fire Insurance Act 1913 and did not appear in the distinctive manner which that Act requires for any variation from these conditions. The timber was set on fire by a spark from an open refuse-burner which was only 80 feet from the timber. The Judicial Committee held that the clause was inoperative, as it was a condition, not a description or limitation of the timber covered by the policy and was not expressed in the required manner.

Onus of proof.—The assured must prove that the loss was caused by the event insured against,[10] and if that is proved the onus shifts to the insurers to show that the loss is of such a nature that it comes within the exceptions[11]. But the onus of proof that by reason of the existence of any condition in a policy, the loss or damage is covered by the policy, shall be agreed upon between the parties. In a recent

1. *Foriskringsaktieselskabet National of Copenhagen* v. *Attorney-General,* (1925) A.C. 639.
2. *Anderson* v. *Fitzgerald,* (1853) 4 H. L. C. 485 at 510, *per* Lord St. Leonards.
3. *Pelly* v. *Royal Exchange Assurance Co.,* (1757) 1 Bur. 341, 349 : 97 E.R. 342, 347.
4. *Crosland* v. *Wrigly,* (1895) 43 W.R. 673.
5. Porter on insurance, 1933 edn., p. 171.
6. (1884) 9 A.C. 671.
7. *Far* v. *Motor Trades Mutual Insurance Society* (1920) 3 K.B. 669, *Roberts* v. *Anglo-American Insurance, Association,* (1927) 96 L.J. (K.B.) 590.
8. (1933) A.C. 240.
9. (1926) A.C. 90.
10. *British and Foreign Marine Insurance Co.* v. *Gaunt,* (1921) 2 A.C. 41.
11. *South British Fire and Marine Insurance Co.* v. *Broja Nath Shah,* (1909) 36 Cal. 516.

case, *Levy* v. *Assicurazi Generalli*[1], it was held that as a matter of agreement between the parties, the onus of proof of any particular fact or of its non-existence may be placed on either party in accordance with the agreement made between them.

Insurable interest.—Any person who has an insurable interest in life or property may effect an insurance on it. The existence of an insurable interest on life was made necessary by the Life Assurance Act, 1774.[2] A like provision with regard to Marine Insurance was made by the Marine Insurance Act of 1906.[3] One has an insurable interest in an event when, if the event happens, he will gain an advantage or if it is frustrated he will suffer a loss[4], for example, an owner of a thing or one having an equitable or beneficial interest in a thing, a person whose right to insure depends upon the existence of a contract relating to the subject-matter of insurance such as all kinds of tenants, mortgagees and persons liable such as insurers.

It has to be remembered that neither a shareholder nor a simple creditor of a company has any insurable interest in any particular asset of the company. In a recent case known as the one man company case, *Macaura* v. *Northern Assurance Co., Ltd., and others,*[5] the owner of a rubber estate sold the whole of the timber therein to a timber company, in consideration of fully paid up shares in the company. Subsequently by policies effected in his own name with several insurance companies, he insured the timber against fire. The greater part of the timber having been destroyed by fire, he sued the insurance companies to recover the loss, but the actions were stayed and the matter was referred to arbitration in pursuance of the conditions contained in the policies. The claimant was the sole shareholder in the company and was also a creditor of the company to a large extent. The arbitrator held that the claimant had no insurable interest in the goods insured and disallowed the claim. The House of Lords held that the claimant had not either as shareholder or creditor any insurable interest in the goods. Lord Wrenbury at page 633 said that the corporation, even if he holds all the shares, is not the corporator and neither he nor any creditor of the company has any property legal or equitable in the assets of the corporation.

Competency.—The assured should be competent to contract at the time.

Premium.—Premium is the consideration received by the insurer from the assured in exchange for his undertaking to indemnify the assured against loss of subject-matter in turn. The amount of premium is fixed by considering all matters affecting the risk. Premium may be fixed by the insured or his agent. Payment of the premium is not always a condition precedent to the completion of the contract, though the universal practice of insurers other than marine is to make it so. The premium is returnable if, for sufficient reasons, the policy never takes effect as in the case of policies void *ab initio*, or if after taking effect the policy ceases to be operative as in the case of policies voidable at the election of the insurers for innocent misrepresentation or concealment or as in the case of insurance effected in expectation of interest and it turns out that the assured has no interest, or as in the case of over-insurance or as in the case of insurers going into liquidation.[6] The premium is not returnable in the case of illegal insurance where parties are in *pari delicto*, or when there is a clause " lost or not lost."

Days of grace.—When an insurance extends over a period of time, during which more than one premium will become payable, a certain number of days called "days of grace" are allowed beyond the due day for the payment of the premium. If a loss occurs during the days of grace and before the renewal and if premium has been paid, before the end of the days of grace but after loss the insurers are liable.[7] In *Stuart* v. *Freeman*, where the policy was for a year with premium payable quarterly, the policy was to be of no effect, if at the death of the assured any quarterly

1. (1940) A.C. 791 (Fire).
2. 14, Geo. III, Ch. 48.
3. 6 Edw. 7 Ch. 11.
4. *Wilson* v. *Jones*, (1867) L.R. 2 Exch. 139.
5. (1925) A.C. 619 (H.L.), (I.R.).
6. *Tanjore Life Insurance Co.* v. *Kuppanna Rao*; I.L.R. 43 Mad. 333.
7. *Tarleton* v. *Staniforth*, (1794) 5 Term Rep. 695, 700 : 101 E.R 386 at 389.

payment should be thirty days in arrears. The assured died after one of the days fixed for the payment of the instalment but it was held that the payment of premium within the days of grace saved the policy from lapsing. Mathew, L.J., observed : "In my opinion, the correct view as to the days of grace allowed by the terms of this policy is that, if payment is made within the time mentioned it is to be taken to have been made on that day appointed for payment and is to be taken to have the same effect as if it had been made on that day."

Risks.—The assured should provide the insurer with all the data to estimate the nature of the risk. Elements of the risk are all facts increasing or diminishing the likelihood that the event insured against will happen sooner or later ; for example, in the case of fire insurance where the house is insured its character, construction or locality, etc., or the nature of the subject-matter, for example, articles like petroleum and gunpowder or in the case of life insurance, the health, the character, ancestry, etc., of the assured. Policies are mostly of two kinds: time policies, and voyage policies. Most policies other than marine are time policies, that is, for a fixed and certain period of time ; they expire at the last moment of the last day therein named. Where a contract is to insure "at" and "from" or "from one place to another or others," the policy is called a voyage policy.[1] In time policies, risk begins when goods start or get into the carrier's hands and continues until arrival in the consignee's hands, but does not continue during a deviation[2].

The commencement of the risk is not conditional on the delivery to the assured of the policy, provided usually that the first premium is paid and the contract is complete in all other respects and even death before delivery of policy is no bar to recovery. Material alteration of the risk avoids the policy, unless the policy expressly states that any alteration avoids it, in which case no loss need occur to avoid the policy. If any material change occurs in the risk between the time of proposal and the time of acceptance the insurers are not bound, for example, where a man was free from disease when he made the proposal for insurance on his life but before the company accepted it he was attacked by pneumonia and the notice of the proposer's illness was not communicated to the insurer, it was held that the proposer's representatives could not recover.[3]

Public policy.—As in the case of all contracts, a policy of insurance will not be enforced by Courts if it is contrary to public policy. In a recent case in *Beresford* v. *Royal Insurance Co.*[4], the House of Lords held that the personal representatives of a person, who having insured his life, committed suicide while sane, cannot recover the policy money from the insurance company, for it would be contrary to public policy to assist a personal representative to recover the fruits of a crime committed by the assured. The contract was held to be contrary to public policy, following *Fender* v. *St. John Mildmay*[5] and dissenting from the American case *North-western Mutual Life Insurance Co.* v. *Johnson*[6]. In *Fender's case*[5], the principle was held to be that no Court ought to assist a criminal to derive benefit from his crime.

Exemption clause.—Policies might exclude insurer's liability for loss in particular cases. For example, a clause in a motor insurance policy[7], that the motor car, when driven will be in safe condition ; a clause in a jewellery insurance policy[8] that the insurer will not be liable for loss caused by theft or dishonesty of a customer; or in the case of burglary insurance policy[9], a clause exempting insurers from liability for theft happening through rioting. In such cases the insurers are exempted from liability for losses so caused.

[To be continued.]

1. *Isaacs v. Royal Insurance Co.*, (1870) L.R. 5 Ex. 296. See section 25, of the Marine Insurance Act, 1906 (6 Edw. 7, C. 41).
2. *Pearson* v. *Commercial Union Assurance, Co.*, (1876) 1 A.C. 498.
3. *Looker* v. *Law Union and Rock Insurance Co.*, (1928) 1 K.B. 554.
4. (1938) A.C. 586.
5. (1938) A.C. 1.
6. (1920) 254 U.S. Rep. 96.
7. *Trickett* v. *Queensland Insurance, Co.*, (1936) A.C. 159.
8. *Lake* v. *Simons*, (1927) A.C. 487.
9. *London and Lancashire Fire Insurance cCo.*, *Ltd.* v. *Bolands, Ltd.*, (1924) A.C. 836.

SUMMARY OF ENGLISH CASES.

BLUNT *v.* BLUNT, (1943) A.C. 517 (H.L.).

Practice—Appeal—Exercise of discretion by trial Court—If can be interfered with on appeal.

An appeal against the exercise of the Court's discretion may succeed on the ground that the discretion was exercised on wrong or inadequate materials, if it can be shown that the Court acted under misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take relevant matters into account, but the appeal is not from the discretion of the Court to the discretion of the appellate tribunal.

Matters to be considered by the Court in exercise of the discretion conferred by section 4 of the Matrimonial Causes Act, 1937, to dismiss or allow a petition for divorce where the petitioner has during the marriage been guilty of adultery indicated.

ABITIBI POWER AND PAPER CO. *v.* MONTREAL TRUST CO., (1943) A.C. 536.

Constitutional Law—British North America Act, 1867—Section 72 (13)—Moratorium Act staying proceedings against a company in liquidation—One regulating property and civil rights within the province and intra vires *the provincial legislature.*

The Abitibi Power and Paper Company Limited Moratorium Acts, 1941 and 1942 (Ontario) which provided that no new action should be brought for the purpose of realising dues on a mortgage by the company and no further steps taken in the action then pending without the consent of the Attorney-General is *intra vires* the Ontario provincial legislature as the pith and substance of the Act was to regulate " property and civil rights" within the province. The Act did not relate to " bankruptcy and insolvency " which were matters within the exclusive legislative competence of the Dominion Parliament under section 91 (21) of the British North America Act.

TRITONIA, LIMITED *v.* EQUITY AND LAW LIFE ASSURANCE SOCIETY, (1943) A.C. 584 (H.L.).

Practice—House of Lords—Right of audience—Limited to counsel instructed on behalf of party or to the party in person—Artificial person like a company can be represented only by a counsel instructed on its behalf.

When an appeal is argued before the House of Lords, no one has any right of audience except counsel instructed on behalf of a party or when the litigant is a natural person the party himself. In the case of a corporation, inasmuch as the artificial entity cannot attend and argue personally, the right of audience is necessarily limited to counsel instructed on the corporation's behalf. *Nairn* v. *University of St. Andrews*, (1909) A.C. 147, explained. The rule limiting the right of audience on behalf of others before the House of Lords to members of the English or Scottish or Northern Irish Bars, secures that the House will be served by barristers or advocates who observe the rules of their profession, who are subject to a disciplinary code, and who are familiar with the methods and scope of advocacy, which are followed in presenting arguments to the House of Lords. Accordingly one of the appellants though authorised by resolution of his co-appellant companies to appear on their behalf will have no right to represent the companies in the appeal before the House of Lords and the companies must appear only by counsel.

MATTOUK *v.* MASSAD, (1943) A.C. 588 (P.C.).

Tort—Action by father for damages for loss of service caused by seduction of his daughter—Proof of rape—If inconsistent with seduction.

The father's or master's cause of action is for the loss of the girl's service and it is illogical to suppose that he could recover if the girl yielded but not recover if he lost the service because the girl was forced into intercourse with the defendant. In the case of rape, the master would have precisely the same action, basing it on the wrong done to his servant, as in the case of any tort to the servant by which the master was deprived of her service. The action can be brought for seduction whether based on the special wrong done to the master by persuading the girl to have intercourse, or on the wrong done to the girl by the felony of rape by which the master suffered damage. The fact that the wrong to the servant was a felony has no bearing on the master's cause of action.

GENERAL MEDICAL COUNCIL *v.* SPACKMAN, (1943) A.C. 627 (H.L.).

Medical Council Act, (1858), section 29—Scope of " due inquiry under "—Decision of divorce Court that a practitioner was guilty of adultery with client—Proceedings by Medical Council for removal of such member for infamous conduct—Other evidence tendered to rebut charge of adultery—Duty to hear.

The legislature has not made in section 29 of the Medical Act, a decree of the Divorce Court conclusive on the question of adulterous conduct in the same way as it has made a conviction of felony or misdemeanour conclusive, so that, in such a case, all that the counsel has to decide on proof of the decree and of the identity of the party is whether the adultery amounts to infamous conduct in a professional respect. Though the decree is *prima facie* evidence of the adultery and very strong evidence too (especially where the person charged did not appeal but paid the damages awarded against him) that is no reason for refusing him the full and fair opportunity of stating his case before the Council

and adduce other evidence in rebuttal if he contests the justness of the decision of the Divorce Court. The Council is not a Court of Appeal but an independent body before whom the practitioner charged appears for the first time and the Council is bound to hold a " due inquiry " on its own responsibility and make its own decision on the evidence before it. If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision. Meaning of " natural justice " discussed, (1942) 2 K.B. 261, affirmed.

Dennis & Sons, Ltd. *v.* West Norfolk Farmers' Manure and Chemical Co-operative Co., Ltd., (1943) 1 Ch. 220.

Practice—Discovery—Privilege—Action between share-holders and company—Reports on effect of articles—How far privileged.

Where a report from Chartered Accountants on the effect of certain of the articles of association was not obtained by the company, for the purpose of defending themselves against any hostile litigation, no privilege from discovery can be claimed in an action by a share-holder against the company; it is only where a document is obtained by a company for that purpose that privilege can be claimed. The shareholders by instituting proceedings two days before the report was received did not lose their right as shareholders to see that which they otherwise would have been entitled to. It must never be forgotten that the rules as to privilege are strict, and, as has so often been said, privilege is not to be extended.

Dalziel. *In re* : Midland Bank Executor and Trustee Company, Ltd. *v.* Bartholomew's Hospital, (1943) 1 Ch. 277.

Will—Gift for maintenance and rebuilding of tomb—Validity—Gift over to charity—If effective.

A clause in a will made the following dispositions : I give to the Governors of St. Bartholomew's Hospital the sum of £ 20,000 free of all death duties to be added to and form part of the existing Dalziel and Wooler Discretionary Fund and I give this legacy upon and subject to the condition that the said Governors of the Hospital shall use the income to arise from this legacy as far as is necessary for the upkeep of the mausoleum in Highgate Cemetery and the garden surrounding the same, that they shall keep the same in good repair and the inscriptions thereon legible and to rebuild the same when requisite, and if they shall fail to carry out this request I give the said sum of £ 20,000 to such other of the charities named in this my will as my trustees may select and as shall be willing to accept the legacy subject to the above conditions." On a construction of the will,

Held, that the maintenance of the mausoleum is clearly not a charitable object and therefore both the gift and the gift over failed.

Kennedy *v.* D'Andrick, (1943) 1 Ch. 291.

Practice—Suit to set aside a judgment on the ground of fraud—Payment of costs and depositing into Court amount of judgment impeached—If can be imposed as a condition on the plaintiff—R. S. C. O. XXVII, rule 15—Not applicable.

In a suit by *D* for damages for conversion of certain chattels sold, the two defendants *R* and *K* entered appearance and put in defence. At the trial after the close of the plaintiff's case the defendants elected not to call any evidence and plaintiff was given judgment and an inquiry as to damages ordered. The inquiry was referred to an Official Referee who made a report that the value of the chattels in question was £ 14,000 and the plaintiff was ultimately given a decree for that amount and costs. The defendants did not attend the further proceedings when the report of the Referee was adopted by the Court and decree given. One of the defendants, *K*. subsequently brought an action alleging that he had been induced by the false and fraudulent promises of *D* that he would not enforce any judgment which he obtained, to absent himself from the inquiry into damages and the hearing on further consideration and claiming that the judgment awarding damages and costs and the report of the Official Referee were obtained by the fraud of *D* and ought to be set aside. *D* then took out a summons asking for an order that *K* be put on terms as a condition of proceeding with the action namely, that he should pay him the costs and bring into Court £ 7,000, part of the damages awarded against him.

Held, that *prima facie*, in the absence of any enactment or rule containing some special provision to the contrary, any person is entitled to issue a writ and to proceed with his action without being put on terms to pay money into Court or to pay costs of any previous proceedings. Order XXVII rule 15 of the Rules of the Supreme Court has no application to such a case. Observations to the contrary at page 470, Annual Practice (1943), disapproved.

Hughes, *In re* : Rea *v.* Black, (1943) 1 Ch. 296.

Will—Gift over on neglect to take name and arms of testator—Neglect because of absence of knowledge of existence of the condition—Effect—" Fail " and " Neglect "—Construction.

A clause in a will provided for a gift over on neglect to take the name and arms of the testator. A legatee living abroad received information that he was entitled to an interest in the property but

it was not until more than twelve months later that he received the further information that the will contained the name and arms clause. On a question of construction,

Held, that "neglect" does not cover every case of failure but only that case where the person acting consciously, omits to do that which he ought to do as a condition of receiving the testator's bounty. "Neglect" imports failure to do something which the person under the obligation knows or ought to know to be a condition. Accordingly the legatee in the case cannot be said to have neglected to assume and take the "name and arms" as required in the will.

In re D (AN INFANT), (1943) 1 Ch. 305.

Guardianship—Infant alien without property—Appointment of guardian by Court.

The jurisdiction to appoint a guardian of an infant is based not on the existence of property but on the infant's need of protection. Accordingly the Court can appoint a guardian for an infant alien though there is no property within its jurisdiction.

JOEL, *In re*: ROGERSON *v.* JOEL, (1943) 1 Ch. 311 (C.A.).

Will—House together with contents—Bequest—Single gift and not separate gifts—Gift of house cannot be disclaimed by donee retaining the contents of the house.

A bequest of a leasehold house "together with its contents" is a single gift and not two separate gifts, and the legatee may not disclaim the gift of the house and retain its contents.

Hotchkys, In re, (1886) 32 Ch.D. 408, not followed.

HODGE, *In re*: MIDLAND BANK EXECUTOR AND TRUSTEE, CO. *v.* MORRISON, (1943) 1 Ch. 300.

Will—Annuity—Provision for payment after death of tenant for life—Acceleration of annuity on disclaimer by tenant for life.

A will provided for annuities payable after the death of the tenant for life. On a disclaimer by the tenant for life,

Held, the annuities were accelerated and took effect from the date of the testator's death. There is no reason why the principle of acceleration should not be appropriate in the case of any interest whether partial, such as an annuity, or residuary. The principle is the same. An interest is postponed that a prior interest may be enjoyed. If that prior interest is determined, whether by the death of a prior beneficiary or for any other cause, the reason for postponement disappears and there is no reason why there should not be acceleration.

CORRELLI, *In re*: WATT *v.* BRIDGES, (1943) 1 Ch. 332.

Will—Bequest to charity—Establishment in perpetuity of a hotel for the entertainment of distinguished foreigners visiting the place—Not a valid charitable bequest—Provision that premises were to be available for annual and provincial meetings of scientists—Not sufficient to save such bequest.

Whether or not the establishment of breathing spaces and air zones or the promotion of science, literature and music is apart from the association of these purposes with a particular locality, valid charitable objects, a bequest for the carrying out of these purposes in Stafford-on-Avon would be a valid charitable bequest.

But the establishment in perpetuity of a hotel for the entertainment of distinguished foreigners would not be a valid charitable bequest, and the fact that the premises were also to be available for the annual and provincial meetings of scientists connected with the Royal Institution would not suffice to save the bequest and the gift for such a purpose will fail.

POLLOCK, *In re*: PUGSLEY *v.* POLLOCK, (1943) 1 Ch. 338.

Will—Administration—Legacy—Interest on pecuniary legacies—Right to—Principles.

A testator bequeathed several pecuniary legacies including £1,000 to his wife "to be paid to her immediately after my death for her immediate requirements" and £10,000 "to my trustees" . . . upon trust for my said son . . . if he shall attain the age of 25 years absolutely but if he shall die under that age then I direct that the same shall fall into and form part of my residuary estate." On the question as to interest on the legacies,

Held, the rules with regard to the payment of interest on pecuniary legacies are technical. In the ordinary case of a pecuniary legacy without direction as to payment of interest on it, the legacy, being vested, carries interest at the expiration of one year from the death of the testator. A contingent pecuniary legacy carries no interest until the contingency happens, but to that rule there is the exception that a contingent pecuniary legacy either to a child of the testator or to a person to whom the testator stands in *loco parentis* carries with it interest from the date of the death of the testator, if there is no other provision in the will for maintenance.

If a legacy is to trustees of the will it carries interest at the expiration of one year from the testators' death. Such interest is regarded as part of the income produced by the legacy. Any such incom-

produced by the investment representing the legacy follows the principal, and if the event happens the income, or the interest, as the case may be, goes to the person to whom, in that event, the capital of the legacy goes. Meantime the interest may be used for the maintenance of the legatee, if in the interval, he requires to be maintained.

SCHEBSMAN, *In re*: OFFICIAL RECEIVER, THE TRUSTEE *v.* CARGO SUPERINTENDENTS (LONDON), LTD., (1943) 1 Ch. 366.

Bankruptcy—Contract with debtor for payment of certain amounts to his wife and daughter—If can be avoided by the trustee in bankruptcy—Payment to wife and daughter—Sufficient performance.

An agreement between an employee and employer after the termination of such employment provided for certain payments being made by the employer company over a period of years, so long during that period as he was living and, after his death within a certain period which happened to his widow and in an event which at the date of the motion, might or might not happen, to his daughter. The consideration for the agreement was that the employee agreed not to engage in any competing business for 10 years from 31st March, 1940. The agreement further provided that if he died on or before 31st March, 1941, the company would pay his widow £ 500 for each of the four years ending 31st March, 1941, 1942, 1943 and 1944. and £ 375 for each of those ending on March, 1945 and that if he died during the conventional years 1941-42, 1942-43, 1943-44 each ending on 5th March, the payments should extend over the period ending 5th March, 1948 and there were further provisions for payments to the daughter if the widow should be dead. The employee was adjudicated bankrupt on 5th March, 1942 and died on 12th May, 1942.

The Official Receiver as trustee in bankruptcy by a motion asked for a declaration that all sums payable under the agreement to the widow and possibly to the daughter after the receiving order formed part of the estate of the debtor on the ground that although the sums were by the agreement, to be paid to the widow or the daughter, the debtor always had the right to intercept them, which right was at the date of the motion, in the trustee, and secondly, that if the debtor had not that right, the provision for the widow and daughter was a voluntary settlement avoided under section 42 (1) of the Bankruptcy Act, 1914, because of his bankruptcy within two years of making it.

Held, (1) under the agreement no term can be implied that the debtor or his sequels in title would have a right to intercept the payments to the widow and daughter. (2) The payment to the wife and daughter (though they were third parties who may not be entitled to sue for it) was due performance of the agreement and the debtor or his trustee cannot change the mode of performance and (3) The agreement did not constitute a settlement within the meaning of section 42 (1) of the Bankruptcy Act which can be avoided by the trustee.

HANSEL *v.* SPINK, (1943) 1 Ch. 396.

Practice—Fund in Court—Application for payment out—Principle of permissive distribution not applicable—Court must take responsibility for payment out.

With a fund in Court, there is no room for the application of the principle of permissive distribution, as for instance where the Court without making any positive order declaring rights, protects personal representatives or trustees by giving them liberty to distribute on a particular footing based on probable inferences. In respect of a fund in Court, the Court must take the responsibility of deciding whether to make or to refuse an order for payment out. The Court will order payment out if the applicant establishes his title.

VISCOUNT FURNESS, *In re*: WILSON *v.* KENMARE, (1943) 1 Ch. 415.

Will—Administration—Decree for general administration—Powers of the trustees to sell property etc.—Cannot be exercised without leave of Court.

After an order for general administration has been made, a trustee is not at liberty to sell, deal with or distribute the assets of the testator's estate without obtaining the sanction of the Court.

Daniels Chancery Practice 8th edition, Volume I, page 916, and Williams on Executors 12th Edition page 1278, disapproved. Lewin on Trusts, 14th Edition, page 313, approved. *Berry* v. *Jibbons*, 8 Ch. 747 and In re *Mansel*, 33 W.R. 727, considered.

REX *v.* CARR-BRIANT, (1943) 1 K.B. 607 (C.C.A.).

Criminal trial—Offence "unless the contrary is proved"—Burden of proof.

In any case, where, either by statute or at common law, some matter is presumed against an accused person " unless the contrary is proved " the jury should be directed that it is for them to decide whether the contrary is proved, that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt, and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish.

LYON v. THE DAILY TELEGRAPH, LTD., (1943) 1 K.B. 746 (C.A.).

Tort—Defamation—Libel—Newspaper—Publication of letter criticising item of entertainment in B.B.C.—Action for libel by the artist against newspaper—Fictitious name and address of writer of letter—Does not take away defence of fair comment.

It cannot be accepted that there is a general rule of law making it the duty of every newspaper to verify the signature and address of the writer of a letter before publishing it, although it may be desirable on public grounds that, so far as is practicable, the newspaper should take such steps. The absence of such verification will not of itself destroy the newspaper's plea of fair comment in an action for libel contained in such letter. The fact that the writer of the letter gave a false name and address does not deprive the newspaper of the defence of fair comment.

The publishers of a newspaper, will not lose the protection of the defence of fair comment by reason of any oblique motive on the part of the writer of the letter. The fairness of the comment contained in the newspaper's correspondence columns must be judged by its tenor, subject only to the proviso that the statement of facts on which the comment is based is not untrue. The Court may, as private individuals, agree or disagree with the opinions expressed. Indeed, it may disagree very much and yet hold that there is nothing in the language used which exceeds the limits of public criticism so as to become mere personal defamation. It is wrong to think that in a case of libel or slander a judicial pronouncement that what the defendant wrote or said was within his right of fair comment means that the Court accepts and endorses his opinions.

LOMAX v. PETER DIXON AND SONS, LTD., (1943) 1 K.B. 671 (C.A.).

Income-tax—Loan advanced by assessee secured on notes—Issue of notes at discount and redemption at premium—Discount and premium—If capital or interest receipts—Assessability to income-tax.

Where a loan is made at or above such a reasonable commercial rate of interest as is applicable to a reasonably sound security there is no presumption that a " discount " at which the loan is made or a premium at which it is payable is in the nature of interest. The true nature of the " discount " or premium (as the case may be) is to be ascertained from all the circumstances, of the case, and apart from any matter of law which may bear on the question (such as the interpretation of the contract), will fall to be determined as a matter of fact by the Inland Revenue Commissioners. In deciding the true nature of the " discount " or premium in so far as it is not conclusively determined by the contract, the following matters together with any other relevant circumstances are important to be considered, namely, the term of the loan, the rate of interest expressly stipulated for, the nature of the capital risk, and the extent to which, if at all, the parties expressly took or may reasonably be supported to have taken the capital risk into account in fixing the terms of the contract. Where no interest is payable as such, different considerations will of course apply. In such a case, a " discount " will normally, if not always, be a discount chargeable under para (*b*) of rule (1) to case III, Income-tax Act. Similarly a " premium " will normally, if not always, be interest.

HOLDMAN v. HAMLYN, (1943) 1 K.B. 664 (C.A.).

Tort—Master and servant—Infant invitee—Injury to—Defence of common employment—Not applicable—Doctrine of common employment—Principles.

In an action for damages by an infant invitee injured by a corn-threshing machine, the defence of common employment was set up.

Held, that a defendant who has lured an invitee into a forbidden area cannot thereafter treat him as a trespasser. If the plaintiff was engaged or requested to help, on the authority of the master, then he becomes a fellow servant with the other servant of the master. If on the other hand, he was engaged to help without any authority at all from the master, then he is in legal strictness a trespasser. In most cases such a plaintiff can find no escape from the dilemma.

The doctrine of common employment is based on an implied undertaking by the workman of the risk of the negligence of those working within that service and can never be applicable when there is no relation between the parties from which such an undertaking can be implied for instance by the absence of capacity to contract by reason of infancy.

A child incapable of taking care of himself and in need of protection against the dangers attendant on his own childish propensities, cannot be taken to have agreed that an undertaking can be implied, that if he were allowed to work for the defendant he would take care of himself from the negligence of his fellow workmen. Even if such an undertaking could have been implied in the contract it would be the duty of the Court to consider whether the contract as a whole was for the infant's benefit. The plaintiff in the circumstances is entitled to succeed.

REX v. THOMPSON, (1943) 1 K.B. 650 (C.C.A.).

Gaming—Poker—Unlawful game—Card game—Question of lawfulness—One of fact.

Any one who keeps premises for playing cards for money, is guilty of unlawful gaming unless the game is one of mere skill. If the element of chance is so slight as to make the game one of mere skill, then it is not unlawful. The question, whether or not a game is one of mere skill, is a question

of fact. Except in a case where the game in question is one which is specifically made illegal by statute, before a judge can rule that a card game is unlawful, a question of fact has to be decided, namely, is the game one of mere skill or not.

Budd *v.* Anderson, (1943) 1 K.B. 642.

Defence (General) Regulations, 1939, Regulation 18-B (I-A)—Ground of detention wrongly stated in copy of order served on detenue—Release on writ of Habeas Corpus *and subsequent re-arrest—Detenue—If can claim damages for false imprisonment in respect of first detention.*

On June 1, 1940, Sir John Anderson,the then Home Secretary made an order under regulation 18-B (I-A) the Defence (General) Regulations, 1939, for the detention of the plaintiff and twenty-four other persons, the ground of detention being that he had been a member of the BritishUnion of Fascists, an organisation of the kind specified in the regulation. In making out a copy or summary of the order, it was stated inaccurately, that the ground of the plaintiff's detention was that he was a person of hostile associations, a ground for detention under regulation 18-B (1), and accurately that the Home Secretary made the order in pursuance of regulation 18-B (1-A). The plaintiff was handed this document when he was arrested. On July, 25, 1940, the advisory committee appointed under regulation 18-B (5) informed the plaintiff in writing correctly that he was detained because he had been a member of an organisation specified in regulation 18-B (1-A). On May 27, 1941, *habeas corpus* proceedings were brought by the plaintiff and ultimately the Divisional Court held that the plaintiff's detention was illegal and his release was ordered. He was afterwards re-arrested under regulation 18-B but was released in May, 1943. He then brought the present action claiming damages for false imprisonment in respect of his first period of detention against Sir John Anderson, the Home Secretary, as having caused the original detention, Herbert Morrison, his successor in office for having continued the detention and the officials in the Home Office.

Held, that the decision in the *habeas corpus* proceedings was not *res judicata* in the present action. The plaintiff was not prejudiced by the deprivation of his rights as the original order for his detention was not invalidated, by the inaccurate copy. The production by the Secretary of State of an order of detention by him *ex facie* regular and duly authenticated constitutes a peremptory defence to any action of false imprisonment and places on the plaintiff the burden of establishing that the order is unwarranted, defective, or otherwise invalid. It being conceded in the present case that the order of June, 11, 1940, was neither unwarranted nor defective nor otherwise invalid, the action must fail. *Liversidge* v. *Sir John Anderson*, (1942) A.C. 206, and *Greene* v. *Home Secretary*, (1942) A.C. 284, applied.

Griffiths *v.* Davies, (1943) 1 K.B. 618.

Practice—Estoppel—Rent restriction—Earlier action by landlord for possession—No objection taken to conventional rent—Subsequent action for rent for different period—Objection that rent is too high—Not barred by estoppel.

If two actions are brought by a landlord in respect of two different rent periods, and in the first action judgment is given for the conventional rent and in the second it is shown that the conventional rent is too high, the Court is bound in such second action to give effect to the provisions of section 1 of the Increase of Rent and Mortgage Interest (Restrictions) Act, (1920) in an application by the tenant to fix the standard rent and current lawful rent. The tenant is not estopped. If in proceedings where the point is not taken, judgment for an amount of conventional rent which is excessive is given against a tenant and later an action is brought against the tenant for the conventional rent at the same rate, in which later proceedings it is shown that the rent is excessive, the earlier judgment cannot give to the Court a jurisdiction which section 1 of the Act of 1920 has denied to it.

Bradshaw. M'Mullan, (1920) 2 I.R. 412, relied on.

Cole *v.* Blackstone and Company, Ltd., (1943) 1 K.B. 615.

Factories Act (1937), section 25 (4)—Duty to maintain ladders in proper condition—Absolute.

To reach the driving cab of his crane the deceased workman had to use a ladder some twenty feet high. On the morning of the accident he was found on the floor at the foot of the ladder, and close beside him was lying one of the rungs. It was obvious that the rung had given way while he was ascending the ladder, with the result, that he fell to the ground and suffered the injuries from which he died. In an action by the widow for damages,

Held, that the statutory duty under section 25 (4) of the Factories Act to keep all ladders in an efficient state and in good repair is as absolute as the duty imposed by the Factories Act to fence all dangerous parts of machinery. The defendants are accordingly liable as the ladder was not in fact in an efficient state or in good repair on the morning of the accident.

King *v.* King, (1943) P. 91 (C.A.).

Divorce—Dismissal of husband's petition—Appeal —Security for wife's costs—Jurisdiction to order.

Security for the wife's costs in an appeal against the dismissal of the husband's petition for divorce will not be ordered as a matter of course merely because the wife has no means of her own for financing her costs of the appeal. The Court has jurisdiction to make such an order and will do so in appropriate circumstances. The wife has authority to employ legal help at the expense of the husband in such a case as the present. Where however the judge exercising divorcej urisdiction makes a

decree of dissolution on the ground of the wife's adultery the doctrine of a common law agency of necessity would deem to be excluded. On the other hand, if a decree which terminates the married status excludes the rule, a solicitor might hesitate to undertake the conduct of an impecunious wife's case if he had only the common law principle of agency on which to rely to get his costs and were driven to sue the husband and it may be that, for the sake of public policy, in relation to the protection of the married status, the rule of ordinary security should be regarded as for that very reason, equally enforceable in the case of a wife seeking to appeal from a decision against her (The question was left open).

JOTTINGS AND CUTTINGS.

The Guillotine Goes.—It is reported that the use of the guillotine has been suspended in France and that it has been replaced by the firing squad. As the last word of the French criminal law it has become so established an institution that people are apt to forget that it was only an adopted child. Dr. Guillotine is supposed to have found the idea in the description of an execution at Milan, in 1702 in an anonymous book of travels. He made experiments on corpses at a hospital and his machine was erected in the Place De Greve to behead a highwayman in 1792, just in good time to popularise it as the instrument of the mass executions of the French Revolutions. During the Middle Ages a similar instrument had been well known in Germany under the name of *Diele* and in Italy under the name of *Mannaia*. It was introduced into Scotland by the Regent Morton and remained in use till 1716, when the last head which fell to it was that of Mr. John Hamilton in 1716. In England a machine of the same kind was in use at Halifax, where custom had established a form of summary justice which did not lapse till after the middle of the seventeenth century. Felons caught with stolen cattle or goods within the liberty of the Forest of Hardwicke were tried before the lord's bailiff at Halifax sitting with four free-holders as a jury and if found guilty they were beheaded. The manner of it was that " the prisoner being brought to the scaffold by the bailiff, the axe being drawn up by a pulley and fastened with a pin to the side of the scaffold ; the bailiff, the jurors and the minister chosen by the prisoner being always upon the scaffold with the prisoner in the most solemn manner . . . If it was a horse, an ox or cow, etc., that was taken with the prisoner, it was thither brought along with him to the place of execution and fastened by a cord to the pin that stayed the block so that when the time of the execution came . . . the bailiff or his servant whipping the beast, the pin was plucked out and execution done. But if there be no beast in the felon's case, then the bailiff or his servant cut the rope " The base of the machine still stands in Gibbet Street.—*S.J. 1943, p. 438.*

Judge Parry.—Sir Edward Parry has died at the age of eighty. During the thirty-three years that he sat as a county court Judge, first at Manchester and afterwards in London, he penetrated the conssciousness of the public as well as the legal world. It was in 1927, that he retired, when he noticed " that though I listened in to all that was said to me as attentively as hitherto, I did not pick up sounds as well as I used to do. Now, a deaf judge is an abomination and ' daily increaseth lies and desolation'". He consulted an aural surgeon, who assured him " that I was a very interesting individual—as an aural specimen—that as a matter of fact since my left ear drum had been blown in in 1898, he considered it had always been more or less out of action ; but that I had adopted a very cunning method of imperceptibly bringing my right ear into action, with intent to deceive people into the belief that I was hearing them with my left . . I was tiring my remaining ear and he strongly advised me not to continue to do so." His ear was injured when he was shot in Court in Manchester by a bailiff whose certificate he had been obliged to withdraw. A barrister on his right hand just made an application and he had turned his head. The movement probably saved his life, for at that moment he heard a terrific explosion. The bullet fired, which would have smashed his face had he not turned, only ran along the side of his jaw. A second shot entered the back of his ear. The surgeon who attended him consoled him, saying : " Don't worry about it, judge, its only the left ear, and in the Manchester Court that's the defendant's side and you never listen to him, you know." " That may be," said Parry, " but there is all the difference between not listening and not hearing when you do listen." Some time after, a doctor, laying down the law on the subject of neurasthenia in relation to malingering, said to him : " I really believe you think you could teach me something about a subject which has been my life study." "I could teach you all about it," he replied. " I should empty a revolver into the back of your head when you were not expecting it. If you got well again you would know all there is to be known about neurasthenia." A son of the famous Serjeant Parry he spent his childhood in the region of Baker Street and Regent's Park. He liked to recall the fascinating world it was then with its four wheelers, its broughams, its smart hansoms, its beautiful gold and green omnibuses. " The selfish noisy bustle of modern traffic with its wearisome failure of movement and cumbersome stoppages, is a poor achievement of modern science ; and the machines of to-day will never recapture the charms of ambling coaches, cabs and omnibuses."—*S.J., 1943, p. 445.*

Profitable Disability.—In the course of the hearing of a recent workmen's compensation case in the House of Lords counsel made the point that an accident might actually cause a man to adopt a more remunerative employment, and Lord Simon thereupon recalled the fact that had Sir Walter Scott not been lame he would have been a soldier instead of a lawyer and a novelist. Lord Thankerton remarked that, in a sense, he did become a soldier. Indeed, Napoleon's threatened invasion of this island gave his martial ardour ample outlet, for, though his disability debarred him from joining the majority of his brethren in the ranks of the Edinburgh Volunteers, he helped to raise a body of

volunteer cavalry in 1797—the Midlothian Yeomanry—and he became the life and soul of the Edinburgh troop, drilling at five in the morning before going to court, dining in the mess, making songs, riding at a turnip stuck on a pole to represent a Frenchman's head and slicing it with his sabre, muttering as he did so : "Cut them down, the villains, cut them down!" Though even on horseback his lameness was a handicap, he rode 100 miles to Dalkeith in a single day on the occasion of the false alarm of invasion in 1805. He had been appointed quartermaster "that he might be spared the rough usage of the ranks," but there could be no reflection on his zeal. Another spoilt soldier who attained eminence through the law was Mr. Baron Cleasby, whose intended military career was frustrated by an illness in 1819 which left him lame for life. Again Mr. Justice Grove would hardly have become so eminent as a scientist had not his career as a lawyer been retarded by ill-health. The respite thus afforded to him enabled him to follow his natural bent towards scientific investigation and the reputation thereby achieved brought him work in patent cases so that as his health improved he was able to go forward into practice.—*S.J., 1943, p. 413.*

Law, History and Microphotography.—The Master of the Rolls, giving his presidential address on 16th November, to the British Records Association at their annual meeting at Vintners' Hall, referred to a scheme for the microphotography of probate registers, which, thanks to a generous grant by the Pilgrim Trust, had become a practical possibility. His Lordship said that since the beginning of the present year, the whole of the registers of wills in the Prerogative Courts of Canterbury and York down to the year 1,700, and a substantial part of the like registers from district Courts to the year 1,600, had been reproduced in this way, and over 200 rolls of film,—altogether more than 20,000 feet in length and containing about 250,000 photographs—had been deposited in a place of safety. His Lordship added that that was not only a considerable contribution to the safeguarding of the country's records, but also a provision of material for research which ought to be of very great benefit to the students of this and other countries when happier times arrived. Apart from its value to students this piece of work was important because of the opportunity it gave to investigate the technique of microphotography in its special relation to records. His Lordship said that he had nominated, at the request of the association, a new committee to consider the post-war problems of English archives. Starting with the practical question of the dangers of destruction and dispersal which, in that period, might be expected to threaten many records with a new gravity, the committee had gone on to survey—taking a wide and long view—the possibilities of what should be not only a post-war but a reconstruction period ; and had formulated proposals affecting the welfare of every category of archives outside the Public Record Office. So long as the war continues, and even for some time after peace comes, the danger of loss of valuable records, whether owing to enemy action or well-intentioned salvage, is very real. The work done by Lord Greene and all those others who have saved and discovered documents of legal or historical value during the present war gives some comfort to those who have lived to see the lamps of civilisation burn low.—*S.J., 1943, p. 417.*

BOOK REVIEWS.

Analytical Survey of Bengal Regulations (and Acts of Parliament relating to India, upto 1833) with a Foreword by the Hon'ble Mr. Justice C. C. Biswas: By Rai M. N. Gupta Bahadur, M.A., B.L., published by the University of Calcutta, 1943.

The book constitutes an attempt to deal with the entire body of Regulations, 675 in number, passed by the United East India Company's Government during the period 1793 to 1834, on a systematised plan so as to present a complete picture of the whole field of administration during the early stages of the growth of British power in India. The Regulations are examined under twelve chapters, each chapter being confined to a subject, a critical and chronological summary of the Regulations being first given followed up later by a synopsis of the Regulations themselves.

It is well known that the East India Company came to this country as traders but stayed to make an empire. The process, though gradual forms one of the most romantic chapters in the history of the British Empire. Till 1833, when the Charter Act declared that the East India Company were to hold the territories in India as "in trust for the Crown of Great Britain and Ireland," neither political quidnuncs nor lawyers could define with precision the constitutional position of the Company with reference to its territorial acquisitions. What with the principle that no subjects of the Crown could acquire sovereignty of any territory for themselves, and the fact that in respect of some areas the company were only lessees from the Moghul administration while in respect of other areas they were holders in jagir, and the further fact that in administering Bengal, Behar and Orissa the Company purported to act as the Dewan of the Moghul Emperor, a precise clarification of their position was then neither possible nor desirable. How from mere traders the company developed into administrators, how from a policy of eliminating Indians from all key posts the company gradually reversed their policy in course of time, how from regarding the *dewani* as a means of enabling them as merchants to make vast profits oblivious altogether to their duty by the inhabitants of the soil resulting in an unparalleled famine in 1769-70, the company thereafter became alive to their duties as administrators, are all expounded in an interesting manner by the author. It is a distinct service to the public that the Calcutta University has rendered by sponsoring this publication. A perusal of it is sure to be highly profitable and instructive to students, lawyers and politicians alike.

Commentaries on the Code of Civil Procedure, by V. V. Chitaley and K. N. Annaji Rao, 4th edition: Published by the All India Reporter, Ltd., Nagpur, Volume II,

This volume deals with the first schedule, Orders 1 to 30. It fully conforms to the plan which the authors have adopted in the first volume relative to the treatment of the subject. If the function of a text book includes the giving of an exhaustive review of the case law the volume under notice constitutes a successful achievement in that direction. One remark in this connection may not be without point, namely, that in any attempt to give the entire case law it may sometimes happen that what are considered leading cases fail to get distinguished from other decisions which merely apply the principles, though in the present work the authors have taken care to indicate the leading decisions by affixing an asterisk mark against them. The commentaries given under each section are full, lucid and helpful. The citation of authorities without the names of the parties being always given and being confined to the A. I. R. references with the addition of the corresponding I. L. R. references where they exist but without references to the other journals is a feature that has come in for criticism in the past. Certainly it would have been much more satisfactory if the authors had been able to take note of the point in the present edition. On the whole the book will be a welcome addition to the library of every busy lawyer.

INDIAN INCOME-TAX ACT, 1922, by A. N. Aiyar, 1944: Published by the Company Law Institute, Thyagarayanagar, Madras.

This elaborate treatise on Indian income-tax law is sure to cater to the needs of the profession and be of great help to the lawyers in regard to a complicated branch of the law. The author who is also the editior of the Indian Income-tax Reports is well qualified by reason of that fact to bring about a publication of this kind. All the relevant English and Indian authorities are marshalled in their appropriate places with a wealth of fact and dicta to augment their utility. On the question whether the fact, that shareholders are given an option to receive their dividend in cash or in bonus shares, would make it amount to a release of the company's assets, the author has pertinently drawn attention to *Wright's case* (11 T.C. 181). It would be interesting to speculate whether the decision would hold good under section 6-A (*a*) of the Indian Income-tax Act. The case of *Byramjee* v. *Province of Bombay*, 7 I.T.R. 670 discussing whether a tax on immovable property based on its annual rental value is in the nature of income-tax and as such is within the competence of the provincial legislature, etc., though mentioned in the index which refers to p. 242 is not to be found in that page. The case of *Raleigh Investment Co.* v. *Governor-General*, 11 I.T.R. 393 might have come in for a fuller notice having regard to the important issue, namely, the extra-territorial powers of the Indian Legislature, which fell to be considered. It is strange that the case of *Wallace Bros.* v. *Commissioner of Income-tax, Bombay* 1943 Com. Cases 315 reported next to the *Raleigh case* in the November-December part of the Company cases, 1943 does not come in for any notice particularly as the Bombay High Court expressed, though obiter, their view that *Raleigh's case* was not a correct exposition of the legal position regarding extra-territorial powers of the central legislature. Cases like *Commissioner of Stamp Duties* v. *Millar*, 48 Com.L.R. 618 and *Trustees Executors Agency* v. *Federal Commissioner of Taxation*, 49 Com.L.R. 220, might also have been noticed in that context. The residence of companies for purposes of taxation always presents a conundrum and one has only to compare the two cases of *Swedish Railway Co.* v *Thompson*, 1925 A.C. 495 and *Egyptian Delta Land Investment Co.* v. *Todd*, 1929 A.C. 1, to realise the difficulties attendant on this topic, for in these two cases on somewhat similar facts the House of Lords has reached different conclusions; yet, the topic has not come in for adequate notice. The recent decision in *Dinshaw Darabshaw* v. *Commissioner of Income-tax* A. I. R. 1943 Bom. 77 holding that certiorari does not lie against decisions of the Commissioner has also not been mentioned.

Despite these, the book will be of great utility to the profession and will also serve as a handy vade mecum to the asessees who can consult it with profit whenever any knotty question of income-tax law crops up. We cordially welcome this publication.

COMMENTARIES ON THE CODE OF CIVIL PROCEDURE by V. V. Chitaley and K. N. Annaji Rao. Published by the All India Reporter, Ltd., Nagpur, 4th edition 1944 volume III.

This volume deals with Orders 31 to 51 of the first schedule and schedules 2 to 5 of the Civil Procedure Code. It also gives in a number of appendices the text of the Indian High Courts Act, 1861; the provisions of the Government of India Acts, 1915, and 1935 relating to Courts; the Letters Patent and the despatch from the Secretary of State for India accompanying the first Letters Patent; the Privy Council Rules, 1920; the Judicial Committee Rules, 1925; the Federal Court Rules, 1942; the Notifications issued under sections 29, 44, 45, and 60 and under Order 5, rule 26, Order 21, rule 48, and Order 21, rules 1, 2, 8 and 8-B; the Report of the Special Committee appointed to consider the amendment of the Civil Procedure Code, 1907, etc.; the texts of the Decrees and Orders Validating Act (V of 1936); the Contempt of Courts Act (XII of 1926); the Arbitration Act (X of 1940); the Indian Soldiers Litigation Act (IV of 1925), etc. A vast mass of materials of a highly useful character has thus been brought together in this volume and made available to the practitioners thereby adding to the completeness of the book. The table of cases occupies about 307 pages in close print, the A. I. R. references alone covering about 137 pages taking in something like 25,000 cases, indicating the enormous number of decisions the authors had to take note of and the exhaustive character of the citations making the volumes veritable case-books. The comments on the various orders and rules conform to the lines adopted by the authors in the first two volumes and the annotations are full and lucid. These features make it apparent that the book is primarily intended for practising lawyers who need detailed references to many applications of the specific law annotated, though conversely the book may not be of much value as presenting an easy over-all summary of the law in distilled form. Together with the first two volumes the book will prove a useful addition to the library of every busy lawyer.

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THE FIBROSA CASE AND AFTER.

It was ruled in *Chandler* v. *Webster*[1] that "in cases of frustration the loss lies where it falls" and moneys advanced under a contract which subsequently was frustrated were not recoverable. This doctrine propounded by Collins, M.R. had been followed in a great variety of cases for nearly four decades though it had occasionally come in for vigorous denunciation, as for instance, in the *Cantiare San Rocco case*[2], where Lord Shaw of Dunfermline spoke of the principle as a maxim which "works well enough among tricksters, gamblers and thieves". The mills of the law no doubt grind slowly, none the less surely; and recently in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.*[3], the justness of the rule fell to be considered by no less than seven law lords (Viscount Simon L.C. and Lords Atkin, Russell of Killowen, Macmillan, Wright, Roche and Porter) who were unanimous in their opinion that the principle had no true basis and held that in respect of money paid in advance under a contract the payer cannot be deprived of the right to recover it as money received to his use, where the consideration for which it had been paid had wholly failed. While some of the law lords based their conclusion on the theory of quasi-contract arising out of terms implied in the contract, others preferred to rest it on the doctrine against unjust enrichment. It is noteworthy that the Court of Appeal itself had in its judgment in the case while feeling bound by the rule in *Chandler* v. *Webster*[1] hinted a hope that the House of Lords might be able to substitute "a more civilised rule". The wish was answered and the rule in *Chandler* v. *Webster*[1] passed away in the language of an English Journal "unwept, unhonoured and unsung".

In the course of his speech the Lord Chancellor had observed: "It must be for the legislature to decide whether provision should be made for an equitable apportionment of pre-paid moneys which have to be returned by the recipient in view of the frustration of the contract in respect of which they were paid". It will be noted with interest that the Government accepted this broad hint and promptly introduced in Parliament the Law Reform (Frustated Contracts) Bill. The Bill incidentally implements the 7th Interim Report of the Law Reforms Commission made in May, 1939. It is made applicable only to contracts frustrated after July, 1943, at whatever time they might have been made. Its provisions are directed mainly at the adjustment of the rights and liabilities of the parties to the contract on frustration. All sums paid by one party to the other under the contract before it was discharged are made recoverable but if the payee had incurred expenses before the discharge in regard to the performance or

1. (1904) 1 K.B. 493 (C.A.).
2. (1924) A.C. 226, 229.
3. (1943) A.C. 32.

attempted performance of his part of the contract, the Court may in its discretion allow him to retain all or any part of the money paid and to recover the excess where more had been spent than what was advanced. The Bill is however limited in its operation. It does not apply to charter parties or contracts of carriage by sea or to contracts for sale of goods which perish before the risk passes to the buyer.

In India, however, the main principles underlying, the Bill are already part of the law of the land (see section 65, Contract Act and the decision of the Privy Council in *Muralidhar Chatterjee* v. *International Film Co., Ltd.*[1]).

TIRUMALAI—TIRUPATI DEVASTHANAMS ACT (AMENDMENT) BILL, 1944.

Stating that "the Tirumalai—Tirupati Devasthanams Committee is desirous of establishing and maintaining a first grade residential college at Tirupati and has requested Government to amend the Tirumalai—Tirupati Devasthanams Act, 1932, so as to enable the Committee to do so", the Government have published the aforementioned Bill designed to give the Committee the necessary authority. The Bill proposes to insert in section 36 of the Act after clause (*i*) the following clause, namely:—

"(*i-a*) the establishment and maintenance of a first grade college at or near Tirupati which shall be mainly residential in character and shall be open to all persons whether Hindus or not".

The Bill is open to criticism in a number of respects. In the first place it is questionable policy to seek to divert the funds of a religious institution to a wholly secular purpose without the sanction of a legislature composed of the representatives of the people. When the question of extending the provisions of the Hindu Women's Rights to Property Act, 1937, to the devolution of agricultural lands in this presidency was mooted, we believe, that the Government took the view that it was a matter with which the legislature alone should deal and that the Government should not take the responsibility for promulgating such a measure, notwithstanding that in some other provinces where also section 93 administration was in operation such legislation had been made, with a view to secure uniformity in the laws of inheritance applicable to the Hindus.

In the present case there is no special urgency. Nor has there been to our knowledge any demand for such a measure from the Hindu public. It is really Hindu public opinion and not the opinion of the Devasthanams Committee that should be paramount in the matter; for, it is not the covering of any loopholes or the curing of any lacunæ in the administration of the Act that has dictated the Bill under notice.

The Bill seems to be opposed to the very object which underlies the Act which it proposes to amend. The Tirumalai—Tirupati Devasthanams Act had been conceived exclusively in the interests of the Hindus and their religion. The amending Bill apparently is intended for the benefit of non-Hindus also. In the original Act the application of the Devasthanam funds is dealt with in two sections, 36 and 37. The first of these provides for the application of the funds in the first instance on certain objects and section 37 governs the utilisation of the surplus funds. Clause (*i*) of section 36 provides among other things for the maintenance of the educational institutions mentioned in Schedule II, two of such institutions being secular. Section 37 authorises the utilisation of the surplus without prejudice to the purposes set out in section 36, *inter alia* on "the establishment of a university or college in which special provision is made for the study of Hindu

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1. (1943) 2 M.L.J. 369 (P.C.).

religion, philosophy and sastras and for promoting the cultivation of Indian arts and architecture". Will not these provisions indicate that diversion of the temple funds for educational purposes outside these provisions is intended to be prohibited? Is it not a legitimate contention that if the Devasthanams have ample funds, even after expenditure warranted by section 36, the aim of the committee should be rather to spend them on the objects set out in section 37 in the first instance than to seek an enlargement of the range of the purposes set out in section 36? Will it not be pertinent criticism that while the objects pertaining to Hindus and the Hindu religion to which the temple funds can be properly applied are yet to be completely carried out a diversion of the temple funds for wholly secular purposes concerning not the Hindus merely but members of all faiths without distinction should not be made?

The amendment of section 36 instead of section 37 might lend point to the criticism that it is designed to avoid any interference or review of the Committee's acts by the Courts. Section 37 (4) provides that against an order of the Committee directing the use of surplus funds for any purpose, it is open to any person having interest, to institute a suit within the prescribed time to modify or set aside such order. But expenditure for any purpose under section 36 cannot come in for scrutiny by the Courts. Again utilisation of the surplus can be only for purposes *ejusdem generis* with those set out in section 36. Nor will an application cy-pres justify user of the funds for a non-religious purpose. Nor can the Hindu Religious Endowments Board sanction such expenditure; for, it will be contrary to the provisions of section 18 of the Madras Hindu Religious Endowments Act which directs the Board to see that all religious endowments are properly administered and duly appropriated to the purposes for which they were founded or exist. There seems to be no sufficient justification for ignoring these considerations and authorising by an amendment of section 36 the utilisation of temple funds to a purpose the propriety of which is very doubtful. The Bill if enacted will also have wide repercussions on the future of denominational foundations and institutions like wakfs, etc., which shall have to be carefully studied. In the circumstances, it is to be desired that the Government should drop the Bill and not proceed any further with it.

SUMMARY OF ENGLISH CASES.

FITZWILLIAM'S COLLIERIES *v.* PHILLIPS, (1943) 2 All.E.R. 346 (H.L.).

Income-tax—Payment by way of liquidated damages for easement to let down surface under mining lease—Is rent.

The amount paid as liquidated damages for exercising the right to let down surface in working a mine under a lease is "rent" within the meaning of the Finance Act, 1934, section 21.

(1942) 1 All.E.R. 648, affirmed, Lord Romer dissenting.

GARBETT *v.* HAZEL, WATSON AND VINEY, LTD., (1943) 2 All.E.R. 359 (C.A.).

Tort—Libel—Publication of photographs side by side—Writing underneath each photograph—Innuendo—Assessment of damages—Principles.

The defendants published in their monthly magazine a photograph of the plaintiff (an outdoor photographer) behind a camera carrying the placard, with a lady on each side of him looking at the photographs which he was showing to them and a couple of children in the front. On the opposite page was a photograph of a naked woman standing in a mountain stream. Under the photograph of the plaintiff were the words "Of course for another shilling madam" and the sentence was continued on the opposite page under the naked lady: "you can have something like this". In an action for libel,

Held, that the publication was defamatory of the plaintiff and the defendants were liable.

Held, further, that evidence that after the publication the plaintiff was addressed as "Smutty" instead of "Sydney" was admissible as evidence of the measure of the damage done.

The innuendo is that the plaintiff-photographer has with him a pocketful of what are called smutty photographs which he is willing to show to people who go up to and deal with him.

Damages for libel should bear some relation to the actual damage or loss sustained by a plaintiff, while of course being of sufficient amount to mark the seriousness of the occasion.

BRADLEY EGG FARM, LTD. *v.* CLIFFORD, (1943) 2 All.E.R. 378 (C.A.).

Contract—Unincorporated company—Executive Committee—Liability for negligence of servant.

Per Scott and Goddard, L.JJ. (Bennet, J., dissenting): The businessmen who accept the office of being on the executive council of an unincorporated society must be regarded in law as pledging their own credit in order to perform the duties which they voluntarily undertake for their so-called society just as do the committee-men of a club. The members of the executive committee are liable for damages caused by the negligence of servants appointed by them in carrying out contracts.

HARRISON *v.* LIVERPOOL CORPORATION, (1943) 2 All.E.R. 449 (C.A.).

Practice—Admission of liability and payment into court—Judgment cannot be for smaller sum.

Practice—Trial—Order for agreed medical report—One report only to be filed.

If money is paid in with an admission of liability, it follows that liability is admitted upto the amount paid in and judgment cannot be given for less, which is not the case where it is paid in with a denial of liability.

Where there is an order for an agreed medical report, only one report should be filed. If there are likely to be points of controversy, then if the agreement is to be completed the parties could only solve them by agreeing and if they cannot come to an agreement there can never be an agreed report. The order should refer to "an agreed medical report" and not to "agreed medical reports". (Proper procedure indicated).

PETTY *v.* PETTY, (1943) 2 All.E.R. 511 (P.D.).

Divorce—Decree after contest—Re-hearing on the ground of availability of fresh evidence—Jurisdiction of divisional court.

In a case in which a Judge has seen both spouses and their respective teams of witnesses and has deliberately attached the credibility to one side and not to the other, he cannot be asked to order a re-hearing on the ground that the production, it may be of a document or a new set of witnesses—is going to induce some other tribunal to say that the Judge believed the wrong set of witnesses. It cannot be said that there was any "error of the court" at the hearing justifying a re-hearing. It is neither desirable nor possible to define the words "error of court", so as to embrace all cases which fall within them and exclude those which do not. It may be easy to say that a particular case was on one side or the other of any line that could possibly be drawn.

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SIR ALLADI KRISHNASWAMI AIYAR'S RESIGNATION.

Sir Alladi Krishnaswami Aiyar's tenure of office as Advocate-General is remarkable in more than one respect. He has been the first law officer of the Crown in Madras for the longest period in the history of that office, certainly in this Presidency and probably in the whole of India. Appointed by Letters Patent issued under the Royal Sign Manual, he continued in office on the coming into force of the Government of India Act, 1935. He has thus been the legal adviser successively to the dyarchical Government that functioned under the Act of 1919, to the interim ministry that was constituted in April, 1937, to the responsible Government set up in July of that year and to the "adviser regime" which subsequently took charge of the administration of the province. This in itself is a wonderful tribute to the unshaken confidence reposed in him and his profound legal acumen and sound knowledge of law by the successive administrations.

When he was appointed Advocate-General in January, 1929, Sir Alladi had no doubt been "caught young"—he was but forty-five then—but he was already at the top of the profession. So great was his reputation as a lawyer of erudition that he was made a member of the expert committee appointed by the Government of India in connection with the Indian Sale of Goods Bill in 1929, and in the next year of the expert committee constituted for drawing up the Partnership Bill.

As Advocate-General, Sir Alladi has represented the Government of Madras in a number of inter-statal arbitrations involving questions of water rights, boundary disputes, etc. In the Cauvery water dispute between Madras and Mysore, he appeared before Mr. Justice Page (then of the Calcutta High Court) being opposed by Sir Chimanlal Setalvad who had been briefed on behalf of Mysore. In the arbitration proceedings concerning the Cochin Harbour dispute, before Mr. Justice Broomfield, he was opposed by Mr. T. R. Venkatarama Sastriar who presented the case for Cochin. In the Periyar water dispute arbitration both in the first instance, before Sir David Devadoss and Mr. V. S. Subrahmania Aiyar, and later before Sir Nalini Ranjan Chaterjee, Sir Alladi appeared against Sir C. P. Ramaswami Aiyar who argued the case on behalf of the Travancore Government.

The establishment of the Federal Court provided Sir Alladi with an ampler theatre in which to pit himself against the best Indian legal talents and exhibit his mastery of the law and arrest the attention of a wider public. Several cases involving intricate questions of constitutional law have been argued by him. Among others, mention may be made to the References concerning the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, and the Hindu Women's Rights to Property Act, 1937, and to the cases where

the validity of Acts like the Madras Prohibition Act, 1937, the Madras Agriculturist Debtors Relief Act, 1938, the Madras General Sales Tax Act, 1939, and the Ordinances promulgated by the Government of India fell to be considered. Sir Alladi did not go "special" at any time but he was equally at home in every branch of the law, whether it was a recondite question of property law or a knotty point of constitutional law or a complicated question of water rights or an abstruse question of Hindu law or Canon law that he had to deal with. He had a vast knowledge of case law, English and Indian, upon which he was able to draw often and with telling effect. His approach to the study of law was in the spirit of an artist and his knowledge was broad-based and accurate.

The time to appraise Sir Alladi's merits as an advocate is not yet, as he continues in active practice. It may however be mentioned that his forensic successes have been phenomenal. Gifted with an exceptionally quick and alert power of comprehension, intellectual eminence, ruthless logic and profound learning he has always been a formidable opponent to tackle in forensic combats. In his youth he had toiled hard and wisely and when he rose to the top of the bar his all round equipment enabled him to retain his position easily. The primacy which the Madras bar enjoys in the intellectual sphere is due in a considerable measure to persons like him. In Sir Alladi's retirement the Government of Madras will be losing the services of one of its ablest Advocates-General in recent times. What is a loss to Government will however be a gain to the public and it will be eminently fitting if at the time of fashioning the constitution of India after the war the services of Sir Alladi with his mastery of constitutional law are available and taken advantage of.

TWO NOTABLE PRONOUNCEMENTS.

Attention may be invited to two noteworthy pronouncements of Scott, L.J., in two recent cases before the Court of Appeal concerning the rule of law and freedom for the citizen. In *Garbett* v. *Hazell, Watson & Viney Ltd.*[1], the learned Lord Justice observed:

"In a democrary like ours the rule of law is the most important principle in public life. That any man should be able to come to the Court and be sure of getting justice is the absolute condition of all democratic life. It is the condition of our freedom—the freedom for which we are now fighting".

It is the maintenance of the rule of law and the independence of the judiciary standing as a bulwark against any encroachments by any one on the rights and freedom of the citizens of the land that have ensured respect and admiration for the British institutions all over the world. The observation referred to was made in action for libel. It is well settled that an action will lie for pictorial libel. The position was taken further in the above case where it was held that such an action will lie even where the sting of the matter arises only by reason of the collocation of the pictures and the letter press, that is to say, by the juxtaposition of the photographs in the magazine and the reading of the words underneath them together.

The other statement of Scott, L.J., occurs in *Lyon* v. *Daily Telegraph Ltd.*[2], which decides a new point in the law about fair comment. The Lord Justice remarked that the right of fair comment "is one of the fundamental rights of free speech and writing which are so dear to the British nation, and it is of vital importance to the rule of law upon which we depend for our personal freedom, that the Courts should preserve the right of fair comment undiminished and unimpaired". It is familiar knowledge that the correspondence column in the press

1. (1943) 2 All.E.R. 359 (C.A.). 2. (1943) 2 All.E.R. 316 (C.A.).

is constantly resorted to as a vehicle of criticism on matters of public interest and importance. Some of the letters so published might give the name and address of the writer while in other cases a *nom de plume* might be employed. The question was argued whether in all these cases there was a duty on the part of the newspaper to verify the correctness of the name and address of the writer before publishing the letter if in any action for libel later on in regard to any such letter the plea of fair comment is raised. In the case in question the letter contained a criticism of a radio entertainment. It was shown that the signatory was a fictitious person and the contention was that the failure of the newspaper to verify the signature and address destroyed the plea of fair comment in an action for libel. In rejecting the contention, it was held that the argument, if sound, would place "upon newspapers a heavy burden—a burden so deterrent in practice as very much to reduce the valuable contribution to public discussion which results from a free publication of correspondence in the press". The Court of Appeal laid down that provided the letter did not exceed the bounds of fair comment on a matter of public interest, the fact that the address given in the letter is false and there is no one of the name with which the letter is signed will not defeat the plea of fair comment on the part of the newspaper.

SUMMARY OF ENGLISH CASES.

LEICESTER PERMANENT BUILDING SOCIETY *v.* BUTT, (1943) 2 All.E.R. 523 (Ch.D.).

Mortgage—Receiver appointed by mortgagee—Duty to account to mortgagee though his position only that of agent of mortgagor—Statutory duty and Law of Property Act (1925), *Section* 109.

A person who is interested in the performance of a statutory duty may maintain an action against a person made liable by the statute to perform the duty for breach of it. A receiver appointed by a mortgagee, though he is the agent of the mortgagor, can be called to account by the mortgagee by whom he had been appointed. There is a statutory duty imposed on the receiver (by section 109 of the Law of Property Act (1925), in the performance of which the mortgagee is interested.

RE I. G. FARBENINDUSTRIE, A. G. AGREEMENT, (1943) 2 All.E.R. 525 (C.A.).

Practice—Adding as party—Having mere commercial interest in the result of proceedings—Not a ground for adding as party—R.S.C., Order 16, *Rule* 11*—Not applicable.*

The fact that a person has a commercial interest in the litigation and nothing more not merely gives him no right to demand to be added as a party to proceedings by the result of which that commercial interest may be affected, but the Court has no jurisdiction to add him any more than it has jurisdiction to add any man in the street. It is the practice of the Court, and the Court has power in proper cases, to add at his own request a party who claims to have a legal interest in the subject-matter of the suit—for instance creditors, debenture-holders and beneficiaries and persons of that character who can be added as defendants in administration proceedings. The fact that it was desirable that the Court should have before it somebody to argue a point did not give the judge jurisdiction to call in somebody to argue it for him as a sort of *amicus curiae* and add as a party to the action somebody who has no legal interest in the result of it.

There is nothing in R.S.C., Order 16, rule 11, which entitled the Court to add for its own convenience a party having a mere commercial interest only in the subject-matter of the suit.

CLARKE *v.* CLARKE, (1943) 2 All.E.R. 540 (P.D.).

Divorce—Nullity of marriage on the ground of absence of consummation due to physical reasons—Decree for—If can be granted when there is a child aged 10 *years— Presumption and onus—Fecundation* ab extra*—Effect.*

A husband who is sued for judicial separation can say that notwithstanding that after four years of married life his wife has borne a child of which he is admittedly the father and notwithstanding that the parties thereafter cohabited for ten years—the marriage

has never in fact been consummated. In cases of this kind there is always a presumption that the marriage has been consummated and the presumption is strong where the wife has borne the husband a child. The onus of satisfying the Court that the marriage has not been consummated lies heavily upon the husband.

It was found on a consideration of the facts and the medical evidence that the marriage had never been consummated and the birth of the child was due to fecundation *ab extra* and a decree of nullity was granted.

AYR COLLIERIES LTD. *v.* LLOYD GEORGE, (1943) 2 All.E.R. 546 (C.A.).

Defence Regulations, Reg. 55 (4)—*Orders under delegation of authority to control and give directions for carrying on an undertaking*—Bona fide *of decision of Minister—Not open to question in Courts.*

An order was made taking control of a colliery by the Minister of Fuel and Power under the Defence (General) Regulations, Reg. 55 (4) the relevant paragraph of which was as follows:—"If it appears to a competent authority that in the interests of public safety, the defence of the realm, or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, it is necessary to take control on behalf of his Majesty of the whole or any part of an existing undertaking, and that for the purpose of exercising such control, it is expedient that the undertaking or part should be carried on in pursuance of an order made under this paragraph, the competent authority may by order authorise any person (hereinafter referred to as an "authorised controller") to exercise, with respect to the undertaking or any part thereof specified in the order such functions of control on behalf of His Majesty as may be provided by the order . . ." Then it goes on to specify how the authorised controller is to exercise his functions and that the undertaking is to be carried on in accordance with his directions.

The appellants contended that there were no adequate grounds upon which the Minister could find, as he said he found, namely that it appeared to him that it was necessary to take control.

Held: The particular Ministry being the competent authority in whose hands Parliament has placed the particular power to decide whether or not it was necessary to take control of a particular undertaking, those matters are not within the competence of the Courts. It is the competent authority that is selected by Parliament that should come to the decision, and, if that decision is come to in good faith, the Civil Court has no power to interfere provided of course that the action is one which is within the four corners of the authority delegated to the Minister. The Court cannot investigate the adequacy of the minister's reasons for the order. The Court cannot investigate the rapidity or the lack of investigation, if it existed, with which he acted. The only constitutional safeguad is the supervision of ministers exercised by Parliament.

LOMAS v. JONES AND SON, (1943) 2 All.E.R. 548 (C.A.).

Tort—Negligence—Master's liability for servant's negligence—Common carrier—Consignee injured while assisting carrier's servant while unloading—Liability.

The appellants were common carriers and the respondent was a farmer who engaged the appellants to carry for him two cows from his farm to another farm and to bring back a heifer. For this purpose the appellant's driver was using a motor lorry. At the time of the accident the lorry was standing in the respondent's farm yard after the heifer had been taken from it. The respondent assisted the driver to close the doors of the lorry. The driver failed to bolt the first door securely and when they were proceeding to fasten the second door, the first door fell upon the respondent and severely injured him. In an action for damages against the appellants,

Held: That the negligence of the appellant's lorry driver in not fastening the bolts of the first door securely was the effective cause of the accident and that the appellants were therefore liable. Whether the driver had implied or apparent authority either to seek assistance or to accept it if offered is irrelevant. The duty of the appellant to the respondent included the duty to see that the van while in the respondent's premises was not put or left in such a condition as to be dangerous to the respondent lawfully present on his own premises.

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THE KUMBAKONAM LAWYERS CONFERENCE.

Few would be disposed to doubt the effective part which lawyers acting vigilantly, in union and in a spirit of realism, can play in regard to the maintenance of the rule of law and the protection of constitutional rights and civil liberties to the extent to which they have been made available to the people of this country against possible encroachment by the executive authorities. Constant vigilance on their part was never needed more than at present when normal conditions of life have been thrown out of gear and the exigencies of war have been responsible for numerous ordinances and special laws being put in force. It is in this background that the conclusions arrived at by the conference of lawyers that met at Kumbakonam recently become noteworthy. According to all accounts the conference was a representative gathering and a great success. The various problems in which the legal profession is interested such as the problem of over-crowding, the regulation of fees "with due regard to the interests of a skilled profession and of the litigant public," the need for organised help to members of the profession who have become incapacitated, etc., were all fully adverted to in the inspiring address of Sir Alladi Krishnaswami Aiyar who presided over the conference and suitable resolutions touching them have also been passed.

It may be useful to recall that in the west, the "atomic view" of individual rights (such as, the personal inalienable rights which had been set forth in terms in the American constitution) had formed the foundation of the nineteenth century jurisprudence. That liberty was good and that personality was to be respected had been accepted by every one. Since then, however, the sociological ideal has considerably changed and the law has been strained and made to accommodate itself *pari passu* thereto. A steady decrease in the respect paid to human personality with a corresponding exaltation of the State—the tendency taking different forms in different countries—is being manifested. For instance during the war of 1914—18 only uttered opinions likely to assist the enemy were forbidden; whereas, during the present war to speak in such a manner as to spread alarm or despondency is punishable. Again matters raising essentially judicial problems are being on an increasing scale withdrawn form the Courts of law. The administrative tribunals show no signs of diminution and recurrent conditions of modern warfare have tended to increase them considerably. In the words of the Right Hon'ble Sir Henry Slesser: "An immense body of legislation has encroached upon the old respect for individual liberty and individual property; social ethics have superseded individual rights. If as has been said, law formerly paralysed, administration, to-day public administration is likely to strangle law"[1]. Sir Henry

1. The Judicial Office and other matters, p. 145.

Slesser pertinently asks: "Are we back in the situation envisaged by Hobbes and defined by Austin where all law consists in the commands of the Sovereign?" If in the western democracies these tendencies and processes are manifesting thmselves in an increasing measure, the diminution in regard to individual liberties and constitutional rights in a country like India is likely to be more and hence the need for constant vigilance to see that the executive does not encroach upon such limited liberties as are available to the individual under the law and the constitution is greater here than elsewhere.

The maintenance of rights and liberties calls for the preservation unimpaired of the powers of our highest Courts. The ordinances have shown a tendency to trench upon such powers and the normal forms of procedure. Thus under ordinance 3 of 1944 a person against whom action is taken thereunder cannot have his position examined through *habeas corpus*. In this context it may not be inappropriate to refer to the recent ruling of the Privy Council in the *Ryots of Garabandho* v. *Zemindar of Parlakimedi*[1], holding that the High Courts have no power to issue *certiorari* to run into the mofussil, upsetting the views which were till then held. It should be the endeavour of all lawyers to see that the jurisdiction of the High Court to correct arbitrary action or abuse of power by tribunals exercising quasi-judicial functions or by executive authority is made secure and full power to issue writs corresponding to the prerogative writs in England is vested in them by statute.

As regards overcrowding at the bar, it is the wastage of trained talent that results therefrom that has to be immediately averted. The devising of benevolent or provident fund schemes can afford only a very restricted measure of relief. Separation of the judiciary from the executive has always been conceded to be a salutary principle. If the principle is given effect to and persons with legal qualifications and experience at the bar are appointed as magistrates the tone and standard of administration will improve and a certain number of lawyers will be absorbed. Likewise it would be but proper if recruitment to other offices where a legal training would be of advantage is made from the ranks of the bar. Thus lawyers can be recruited as income-tax officers, assistant commissioners and inspectors of religious endowments, panchayat officers, commissioners of municipalities, etc.

With reference to recruitment to the judiciary, apropos of the conditions in England, Sir Henry Slesser has made the suggestion that it should be done in regard to every class of Judges by the Lord Chancellor, a person in touch with the bar, assisted if need be by a committee consisting of the Lord Chief Justice, the Master of the Rolls, the President of the Probate Division and a County Court Judge. On that line of reasoning the powers of recruitment to the subordinate judiciary, where it is to be made from the bar, should be entrusted to the High Court. In regard to the personnel of the High Court Bench, an interesting suggestion has been made by Dr. Katju recently in the columns of the Allahabad Law Journal that the selection should be made by a committee composed of the Chief Justices of the High Courts presided over by the Chief Justice of India, the selection to be made in case of difficulty in finding a suitable person from the bar of any particular province to the Bench of that province, from among the members of the bar of the other provinces.

A point of great concern to the members of the bar is the question of their liability for disciplinary action as well in case of conviction for political offences. Such liability does not exist in the case of persons pursuing other professions. To

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1. (1943) 2 M.L.J. 254 (P.C.).

postulate and enforce the additional liability in the case of lawyers will be practically to shut them from taking part in politics and thereby deny to them one of the elementary rights of every citizen. It may in passing be also noted that on the question of the existence of the liability itself there is some difference of judicial opinion. It is to be hoped that the committee appointed by the Lawyers Conference to consider this matter will be able to evolve a satisfactory solution.

LAW OF INSURANCE*

BY

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III

Questions of renewal and re-insurance of policies, of over-insurance and novation, of amalgamation and of assignment and transfer occupy a prominent place in the law of insurance.

Renewal.—The duration of the policy is fixed by agreement. It can be previously determined by breach of condition subsequent, by mutual agreement, or by a winding up. As loss after the expiry of the duration of the policy is not covered, policy has to be renewed before the expiry of the period fixed. Except in life policies, renewal is possible only by mutual consent. In the case of renewal by mutual consent, each renewal is to be deemed a fresh policy and the duty of good faith and full disclosure attaches. Life policy is a continuing insurance till death and the assured is given an absolute right to renew on payment of renewal premium. As it is a continuing insurance, renewal in life-policy is not a fresh contract and the assured is not under a duty to inform the insurers of the assured's change of health. For the same reason, if the assured committed a breach of good faith by concealment or misrepresentation in the beginning, the right of the insurers to avoid the policy, continues even after the renewal. For renewals, in the case of life policy thirty days of grace and in the case of fire policy fifteen days of grace are allowed, and for renewal of motor vehicle insurance policies no days of grace are allowed.

Re-insurance.—An insurer, when he feels that he has entered into a risky insurance, lessens his liability by insuring his insured risk. This is known as re-insurance. An insurer has insurable interest to re-insure to the full extent of his liability. The insurer need not insure the whole risk or the whole amount of the risk. He can re-insure a portion of his liability. The disabilities attaching to insurance attach to re-insurance. Where insurance is *ultra vires* re-insurance also is *ultra vires*. Where the insurers grant two policies on the same property, the total amount of them being greater than the value of the property insured and subsequently they re-insure on one of such policies only, the amount of liability of the re-insurer will depend on whether the insurance policies are concurrent or successive. If the insurances are concurrent, the re-insurer has to pay such portion of the whole loss as is equal to the proportion which the re-insurer's policy bears to the whole sum insured. If the insurances are successive and the original insurers were liable only on the second policy, and the second policy was re-insured, the re-insurer will have to pay up to the full amount on the policy of insurance. The re-insured should show good

* Lectures III and IV of the lectures delivered under the auspices of the Madras Bar Council. A summary of Lectures I and II was published in (1944) 1 M.L.J. p. 23 (Journal).

faith as if he were seeking insurance and not re-insurance. The re-insured must communicate information possessed by him and material to the risk at the time of re-insurance, though it was not communicated to him, by his insured at the time of the original policy. Concealment and misrepresentation avoid the policy of re-insurance. The essentials to be complied with by an insurance company as a condition to its legal formation have to be complied with by a re-insurance company also. It was held in a recent case, *Forsikringsaktieselskabet National (of Copenhagen) v. Attorney-General*[1] that the business of re-insuring fire risks, is fire insurance business within the meaning of the Assurance Companies Act of 1901. Accordingly it was held there a foreign company which carries on business of re-insurance of fire risks in the United Kingdom must deposit with the Paymaster-General, £ 20,000, as prescribed by section 2, sub-section 1 of the Act.

The terms of the head policy of insurance cannot be varied without the knowledge and consent of the re-insurers. Where certain insurers of a ship who had re-insured a part of the risk entered into an agreement with the owners of the ship for the reduction of the insured amount and for return of part of the premium without the knowledge of the insurers and the ship became a total loss, it was held that the re-insurers were relieved from liability.[2]

Over-insurance.—The assured to safeguard his interest sometimes over-insures. The assured does not acquire any greater right by over-insurance. Over-insurance is effected in two ways : (1) by double insurance in two or more policies, (2) by excessive insurance in one policy. To constitute double insurence, (*a*) all policies must be effected by the same assured for the protection of the same interest, in the same subject-matter ; (*b*) all policies must cover same risks ; (*c*) all policies must be valid and subsisting. If the amount secured by the various policies exceed a full indemnity two alternative courses are open : (*a*) he may select a policy upon which to take his full indemnity; (*b*) he may distribute the loss rateably amongst the insurers upon all policies in proportion to the amount insured thereby.

In unvalued policies, no question of over-valuation arises. In valued policies, if the value stated is an over-valuation to the knowledge of the assured but concealed from the insurers and if the assured is guilty of fraud or if the valuation is so excessive as to make the policy a contract by way of gaming or wagering, the policy is avoided.

Novation and amalgamation.—Another method by which an insurer releases his liability under insurance is by amalgamation or novation. Amalgamation means arrangements between insurance companies by which one company takes over the business of another company. It makes the shareholders of one company shareholders in the other.[3] Sections 35 to 37 of the Indian Insurance Act (IV of 1938) deal with these subjects. Life insurance business of one insurer shall be transferred to or amalgamated with the life insurance business of another only in accordance with a scheme sanctioned by the Court having jurisdiction over one or more of the insurers. Two months before making an application to Court, notice of the intention to make it, with a statement of the nature of the transfer or amalgamation, shall be given to the Central Government and during these two months certified copies of draft of the agreement or scheme, statements of the assets and liabilities of the company and also the actual report or other reports on which the scheme or agreement is founded, shall be furnished to the Central Government and they shall be kept open for inspection at the head or branch offices. When application for sanction is made to Court, the Court shall send notice of it to all policy-holders in British India and shall cause a statement of the terms of transfer or amalgamation published ; and after hearing the directors and policy-holders who apply to be

1. (1925) A.C. 639.
2. *Norwich Union Fire Insurance Society v. Colonial Mutual (Fire) Insurance Co.*, (1922) 1 K. B. 461.
3. In re *South African Supply and Cold Storage Wild v. Same Co.*, (1904) 2 Ch. 268.

heard it may sanction the same. When amalgamation or transfer takes place between any two insurers, the insurer carrying on the amalgamated or transferred business shall furnish to the Central Government a certified copy of the scheme with a declaration that no payments other than those mentioned in the scheme have been made or are to be made.

An insurance company which transfers its *ultra vires* business or which cannot by its constitution compel the contract-holders to look to the new company is not entitled to be dissolved and may be resuscitated. Rights of policy-holders and creditors of the transferor-company against the transferring-company are not affected, unless dissolution, transfer or amalgamation involves a discharge to creditors of the dissolving company or unless they accept the indemnity of the new company. To avoid risk of novation by acquiescence a formal written protest and payment of premium subject to it is necessary. Payment of premium in ignorance of the change is not assent to it.

Assignment of policy.—The assured also may assign or transfer his policy, totally or partially; in the former case, the assignor cannot recover, because he has lost his interest; in the latter case, he can recover to the extent of his remaining interest. Assignment may be of the subject-matter or of the policy or of both. It may be voluntary or by operation of law. The assignment of the subject-matter may be by sale and purchase. To divest the assured of his interest, absolute sale is necessary. A mere contract to sell or an incomplete sale is insufficient. Where the assured is a firm, a change in a firm by a retiring partner assigning his interest to the other partners or by admission of a new partner deprives the firm of its interest. In such cases, there is necessity for the consent of the insurers. Similarly an assignment of the policy may be effected in two ways, by assignment of the policy itself (contract) or by the assignment of the proceeds of the policy. To constitute a valid assignment of a policy, consent of the insurers has to be obtained in fire insurance but in life insurance, no such consent is necessary. Assignment of policy should be simultaneous with the assignment of the insured's interest in the subject-matter. There may be an assignment of the proceeds in which case the assignee need not have any interest in the subject-matter. If loss had already happened, the proceeds of insurance could be assigned as a chose in action. If loss had not happened and if during the policy an assignment of the right to be subsequently acquired is made, the assignee should fulfil all conditions precedent.

By section 5 of the English Policies of Assurance Act, 1867, an assignment may be made by endorsement on the policy or by a separate instrument. Such an assignment may be created even by word of mouth and an equitable mortgage may be effected by the deposit of a policy of insurance.

Section 38 of the Indian Insurance Act IV of 1938 deals with the assignment of insurance policies. Under it a transfer or assignment of a policy of life insurance whether with or without consideration shall be made only by an endorsement upon the policy itself or by a separate instrument, signed in either case by the transferor or by the assignor or his duly authorised agent and attested by at least one witness, especially setting forth the fact of transfer or assignment. The transfer or assignment shall be complete then, but except where it is in favour of the insurer, it shall not be operative as against the insurer and shall not confer upon the transferee or assignee any right to sue until a notice in writing of the transfer together with the said endorsement or instrument or its copy certified to be correct by both the transferor and the transferee has been delivered to the insurer. The date of notice delivered to the insurer settles the priority of all claims under a transfer or assignment of all claims as between persons interested in the policy. Upon the receipt of such notice, the insurer shall record the fact of transfer or assignment with its date and the name of the transferee or assignee and shall on the request of the person giving notice grant a written acknowledgment of the receipt of such notice. Such acknowledgment shall be conclusive evidence against the insurer of the receipt of

such notice. From the date of such notice, the insurer shall recognise such transferee or assignee only as the person entitled to benefit under the policy, subject to all equities to which the assignor or transferor was subject. The assignee or transferee is liable for all defences which the insurers are entitled to raise against the assignor such as fraud, etc.; or if the assignor of a policy which was taken in his favour by a third party is guilty of felony against such other third party, the assignee cannot sue for the benefit under the policy on grounds of public policy. In *Cleaver* v. *Mutual Reserve Fund Life Association*[1], it was held that, when a husband took a policy in favour of his wife and the wife assigned it in favour of another and murdered her husband, no suit could be brought. Assignment by operation of law takes place upon death or bankruptcy of the assured.

Claim.—As soon as loss occurs to the insured goods, a claim has to be made by the insured stating such particulars of loss as are available to him. To save the insurers from unfounded claims, the assured should give notice of full, available, best particulars of the loss within a reasonable time. The notice need not be in writing. It may be given to the agent of the insurer.

The insured should guard against making fraudulent claims. By making fraudulent claims, he forfeits all benefits under the policy. Claims put forward knowing that no loss is suffered or in a deliberately exaggerated manner to fix a basis for negotiating a settlement are fraudulent.

Arbitration clauses.—Sometimes there are arbitration clauses to refer disputes arising under the policy to arbitration especially in the case of marine policies. Originally, an unqualified agreement to refer to arbitration was held to be invalid as it precluded parties from enforcing their claims by a regular suit. But the decision of the House of Lords in *Scott* v. *Avory*,[2] which was approved in *Jureidini's case*[3], altered the above rule and held that when the parties have entered into a contract of indemnity they may, if they chose, agree that in the event of any loss occurring, such loss should be ascertained by an arbitrator whom they may select and they may agree to pay such loss when it has been ascertained but not otherwise. An arbitration clause in a policy does not preclude the assured from bringing an action to enforce a claim, but if the assured sues, the insurers are entitled to apply for a stay of the action. Usually an arbitration clause provides that the award of arbitrators is a condition precedent to sue, *vide* section 4 of the Indian Arbitration Act (IX of 1899). In such cases, only an action on the arbitrators' award lies.

Principle of indemnity.—After a claim is made by the assured, the insurer has to indemnify the assured except in cases of life insurance or accident insurance. Only what has been lost need be made good. If the subject of loss is not totally destroyed, the assured can claim only damages on his restoration of the damaged property to the insurer. If he does not treat the subject of loss as wholly lost to him, he cannot demand that the whole loss should be made good to him. This doctrine of abandonment though chiefly applied to marine insurance, is applicable to every kind of insurance on property; and the assured shall release to the insurer all ways and means of repairing the loss.

The indemnity may be (1) by payment, or (2) by re-instatement in the case of destruction of building by fire. If the insurer elects to pay, he cannot re-instate. As all policies on property (policies on life and on accident being exceptions) are contracts of indemnity, the interest of the assured must be actually ascertained. Even in valued policies the interest of the assured must be actually proved. This leads to the conclusion that only the loss may be made good. If the property is not totally destroyed the assured can claim the value of the injury unless what remains in surrendered to the insurer. It has to be remembered that the test in the doctrine of abandonment consists in the property losing its identity. The assured must repair the loss and not release any right of action to the prejudice of his insurers.

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1. (1892) 1 Q.B. 147.
2. (1855) 5 H.L.C. 811.
3. (1915) A.C. 499.

While considering the extent of such indemnity, it is to be noted that where things insured are constant, such as buildings, etc., the indemnity should be up to the amount named in the policy; that when the policy made subject to conditions of average and the goods at risk exceeds in value the amount insured on goods in the place named, the risk only attaches to the goods to the extent of such value, and that only direct damages are indemnified and not indirect damages such as loss of business. The amount of indemnity has to be determined not by the cost but by the market value at the date of the loss. Indemnity is limited by other qualifications such as the marine rule " one-third new for old."

Payment.—Payment of the claim must be in cash to the assured or his personal representatives or assignees or trustees in bankruptcy or if a garnishee order is made against insurer, to the judgment-debtor. In the case of conflicting claims, in life policies insurers are entitled to discharge on payment into Court. Section 47 of the Indian Insurance Act (IV of 1938) enacts that where a life policy has ripened for payment and it is not possible for the insurer to obtain a satisfactory discharge either because of conflict of claims or of insufficient proof of title to the amount secured thereby or any other sufficient cause, the insurer can apply to deposit the amount in Court before nine months from the date of the maturing of the policy, and in case of death of the insured, before the expiry of six months from his death.

In the case of policies other than of life insurance, the insurers have no direct right to pay into Court, the remedy consisting in interpleading and getting an order to pay the amount in Court and getting a discharge. When the insurers cannot be compelled to pay a claim, they make *ex-gratia* payments. Insured amount paid under a mistake of fact as to loss or damage contemplated under the policy is returnable where there is really no such loss or damage. *Vide Norwich Union Fire Insurance Society, Ltd.* v. *W. M. H. Policy, Ltd.*[1]

Re-instatement.—Payment is not the only mode of satisfying the claim. In the case of fire insurance an alternative method of meeting the claim is by re-instatement, the restoration of the subject-matter of insurance to its former condition before loss. Anyone interested in the property such as a mortgagee, etc., may apply to the insurer to re-instate. Notice to re-instate should be given before money is paid. If the insurer refuses to re-instate, he might be made to do so by mandamus. Where a landlord sues on the policy for compensation, but the tenant sues for re-instatement, the insurer's remedy is to file an inter-pleader suit. Re-instatement should be within a reasonable time. He must make the new building as good as the old, otherwise the insurer is liable to an action for compensation by the assured. If the thing insured cannot be put back in the same locality and if nothing is said about the locality, re-instatement should be made within a reasonable distance of the locality. If the insurers elect to re-instate and a fire occurs during the re-instatement the insurers are their own insurers and must re-instate *de novo*. If re-instating is lawful at the time of election but later becomes impossible, the insurers are liable in damages.

Subrogation.—As soon as the claim is thus satisfied either by payment or re-instatement, the insurer becomes entitled to be subrogated to the rights of the assured. Subrogation is treating the insurer as standing in the place of the assured as regards the latter's right of action against some other person primarily liable to the insurer. Unless the assured is fully indemnified, the insurer gets no right to it. After full indemnity, the insurer is entitled to the advantages incidental or attached to the ownership of the thing[2]. The insurer can recover from the assured benefits received by him from other sources in excess of his actual loss. If the injury to the property is due to the acts of the assured, subrogation does not apply. By subrogation, the insurer's claim in case of unvalued policies is limited to the extent of the indemnity paid, in case of valued policies to such proportion only of those damages as the amount insured bears to the valuation of the policies. The insurers can

1. (1934) A.C. 455.

2. *Castellain* v. *Preston*, (1883) 11 Q.B.D. 380 at 388.

claim all the salvaged property. The insurers are subject to all defences available against the assured. The assured must not prejudice the insurer by not suing on the whole damage or by releasing the action or by compromising it.

Contribution.—When there are different insurers of the same interest in respect of the same property against the same peril and the total amount insured against exceeds the total value of the subject-matter and when the insurer pays or has to pay the full amount to the insured he is entitled to claim contribution from the remaining insurers.[1] If therefore he has effected two or more insurances in respect of his interest and their total amount exceeds the amount of his loss, it is necessary to apportion the amount recoverable among the different sets of insurers, in order to prevent the amount being borne in an undue proportion by any one of them. Thus, contribution, as distinguished from subrogation, implies more than one contract of insurance, each undertaking similar liability over some subject-matter and interest. The amount of insurance must exceed the value of the property or damage. The assured must have concurrent remedies against the insurer and the person causing the loss. The rule of contribution applies to all classes of insurance which are contracts of indemnity. The right of contribution does not depend upon the contract but on principles of equity.

Sometimes conditions are inserted in the policy to compel the assured to distribute the loss amongst different policies and to prevent him from obtaining payment in full under one policy. The policy usually contains a condition commonly called the contribution clause, to the effect that if at the time of any destruction or damage happening to the property insured by it there is any other insurance effected by or on behalf of the assured covering any of the property destroyed, the liability of the insurers is to be limited to their rateable proportion for which they are liable after all policies subsisting at the time of the loss have been taken into consideration. The apportionment of the loss is governed by various rules of practice[2].

IV

Foreign Companies.—Insurance companies incorporated under the law of one country might carry on business in another country having different laws. In such cases, the domicil of the company is its principal place of business.[3] A foreign company which carries on business through an agent but has no office does not establish a place of business in the country where the agent does the business, *Princess Clementine*, (1899) P. 18. Foreign insurance companies incorporated outside the United Kingdom or India and doing business in the United Kingdom or in this country have to comply with certain requirements regarding deposits, etc.[4] In *Forsikringsaktieselskabet National of Copenhagen* v. *Attorney-General*[5], it has been held that a foreign company carrying on the business of re-insurance of fire-risks in the United Kingdom is bound to deposit with the Paymaster-General the sum prescribed by section 2, sub-section 1 of the Assurance Companies Act. Lord Dunedin observed in that case at page 643 : " The policy of the statute is no more and no less than this : You that dabble in insurance business shall deposit a certain sum to give partial security that you shall pay your debt." Supposing those foreign insurances, companies do not comply with such requirements, does the policy become invalid ? It has been held in the United States of America that the company will incur the prescribed penalties but its policies will be binding and may be enforced by the holder in the same manner as if the company had been qualified.[6] The same seems to be the law in India under similar circumstances.[7]

1. *North British and Mercantile Insurance Co.* v. *London, Liverpool and Globe Insurance Co.*, (1877) 5 Ch. D. 569.

2. *See* Baker Welford and Otter Barry, Fire Insurance, Ch. XXIV. 3rd Edn., 1932.

3. *Michell* v. *Egyptian Hotels, Ltd.*, (1915) A.C. 1022 ; *Carron Iron Co.* v. *Maclaren*, (1855) 5 H.L. C. 416.

4. *Vide* sections 343 to 352 and Sch. X, part III of the English Companies Act of 1928. *Vide* section 62 of the Indian Insurance Act (IV of 1938).

5. (1925) A.C. 639.

6. *Berry* v. *Knight Templars and Masons Life* (1891) 46 Fed. Rep. 429.

7. *Vide* sections 102 and 103 of the Indian Insurance Act, (IV of 1938).

Law governing.—What is the law that governs a foreign company? This is decided by the provisions in the contract. If there is no provision in the contract, it is a matter of construction of the contract itself, read in the light of surrounding circumstances. The general rule is that the law of the country *lex loci*, where the contract is made, governs the nature, the obligations, and the interpretation of it unless the contrary appears to be the express intention of the parties.[1] If the assured wants a contract with a foreign company to be governed by the law of his own country, he should have a provision inserted to that effect in the policy in order to oust the *lex loci contractus.*[2] There are certain cases in which the law of England must be applied even though the law generally applicable may be that of a foreign country. Those cases are : (*i*) where the policy is one which by reason of some defect in form is not enforceable by English law, vide *Lerouse* v. *Brown*[3], for example, verbal contracts which are enforceable within the year ; (*ii*) where the policy is one, the making of which is prohibited by English law or is inconsistent with English ideas of public policy.[4]

Place of Contract.—When a foreign company carrying on business within the realm grants a policy, the contract will be held to be made at the head office abroad of such company, if the consent to issue it must be and is there given ; and it may be sued on there. If the insurer's agents in the country of the assured have power to effect a complete contract there without reference to the head-office, the contract will not be foreign, and will be valid where made, even though forbidden by a monopoly within the domestic forum of the insurers.[5]

Place of payment.—Where the policy is foreign, in the absence of a provision in it as to the place of payment the demand must be made at the head office before the company can be considered to be in default. But in the case of insolvency, the creditor on a policy would be entitled to rank in his own forum against any funds deposited there within its jurisdiction.[6]

Where the company and the contract are both foreign, judgment may be obtained in the *locus contractus* and then proceeded on in the English Court under R. S. C., 1883, Ord. III, R. 6 and Ord. XIV.[7] A winding up order may be obtained against a registered company, even though the person, property, management and directorship be abroad, provided that it is a company which at the outset contemplates some description of business in England even though in substance, all its operations may be abroad.[8]

Effect of war on contract.—An alien enemy including a corporation[9] is incapable of contracting with a British subject and cannot during the continuance of hostilities between the countries with which he is to be identified and Great Britain enter into a valid contract of insurance with British Insurers.[10] If the policy is effected and the contract entered into before the outbreak of war, the policy is only suspended during the continuance of the war, but can be enforced after the conclusion of peace.[11] It is the war and the war alone that makes trading with enemy illegal and a mere probability of war has not the same operation as war itself. In *Janson* v. *Driefontein Consolidated Mines*[9], the plaintiff who had effected with the respondents, a company registered under the law of the South African Republic, a policy at Lloyds on a large quantity of gold which was being consigned from South Africa to London, sued on this policy dated August 1, 1899, in respect of a seizure by the Transvaal Government of the gold in question of October 2 of the same year. The defence to the action in question rested upon the proposition that the policy was an unlawful contract. The making of the policy and the loss occurred before the breaking out

1. *Jacobs* v. *Credit Lyonnais,* (1884) 12 Q.B.D. 589 at 600.
2. *Robinson* v. *Bland,* (1760) 2 Burr. 1077 : 97 E.R. 717.
3. (1852) 12 C.B. 801 : 138 E.R. 1119.
4. *Vide* Baker Welford Fire Insurance, 3rd Edn., 1932, page 410.
5. *Pattison* v. *Mills,* (1828) 1 Dow. and Cl. (H.L.) 342 at p. 382.
6. *Thurburn* v. *Steward,* (1871) L.R. 3 P.C. 478.
7. *Grant* v. *Easton,* (1883) 13 Q.B.D. 302.
8. *Bulkeyby* v. *Schutz,* (1871) L.R. 3 P.C. 764; *Bateman* v. *Service,* (1881) 6 A.C. 386 ; *Princess of Reuss* v. *Bos.,* (1867) L.R. 5 H.L. 176.
9. *Janson* v. *Driefontein Consolidated Mines,* (1902) A.C. 484, per Lord Lindley, at p. 505.
10. *Ibid.,* per Lord Davey, at page 499.
11. *Ibid.,* per Lord Halsbury, at page 493.

of the war which was on October 11, 1899, the crucial point between the parties being whether the war had been commenced or a mere imminence of war existed when the seizure was made on October 2, 1899. The Judicial Committee held that the plaintiff could recover. Lord Halsbury observed at page 496 : " I do not think we are at liberty to consider whether the contract must be against public policy because one of the parties to it might become an alien enemy afterwards." Lord Davey said at page 498 as follows : " There are three rules which are established in our common law. The first is that the king's subject cannot trade with an alien enemy, that is, a person owing allegiance to Government at war with the king, without the king's licenee. Every contract made in violation of the principle is void and the goods which are the subject of the contract are liable to confiscation. The second principle is that no action can be maintained against an insurer of an enemy's goods or ships against capture by the British Government. The third principle is that, if the loss had taken place before the commencement of hostilities, the right of action on a policy of insurance by which the goods lost were insured is suspended during the continuance of war and revives on the restoration of peace."

Thus the effect of war on contracts may be summarised as follows : (*a*) If a loss has taken place before the outbreak of war, the assured may, on the conclusion of peace, but not before, sue on the policy.[1] (*b*) If loss takes place after the conclusion of peace, it takes place under a valid contract and the assured is entitled to recover in respect of it.[2] (*c*) If the loss takes place during hostilities whether connected with such hostilities as where a fire is occasioned in the course of military operations, whether on the part of the British Forces or their allies, or of the assured's own countrymen, the assured is prohibited from recovering on the ground of public policy.[1]

The prohibition applies only to claims made by alien enemies. British subjects can enforce claims in a British forum against alien enemies arising under contracts made before the outbreak of the war, provided they can be served[3] British insurers can accordingly enforce payment of premium against alien assured[4], or a British assured can enforce against alien insurers' claims under his policy.[5] In the words of Lord Lindley :

" When considering questions arising with an alien enemy, it is not the nationality of a person but his place of business during war that is important. An Englishman carrying on business in an enemy's country is treated as an alien enemy in considering the validity or invalidity of his commercial contract."

The stringency of this rule may be relaxed by treaty, Order in Council or license.[6]

Insurance of foreign property in war time.—Insurance of foreign property in war time may be considered from two aspects. (*a*) Insurance against acts of the Government of the insurer[7] ; (*b*) Insurance against acts of the Government of the assured.[8] For a long time the first of these was regarded as so much in accordance with the commercial interest of the country that it was not objected to on any legal grounds. Lord Mansfield supported such transactions, but not their legality. On the death of Lord Mansfield in 1793, the revolutionary war broke out in France and the Traitors Correspondence Act[9] was passed, section 4 of which declared insurance on French ships and goods to be null and void. Lord Kenyon succeeded Lord Mansfield as Chief Justice and he decided some cases in favour of the assured, and some against him. Such of the cases decided against the assured were decided on the ground of trading with the enemy. It is evident that to base the illegality of the insurance in question upon the doctrine of trading with the enemy was to fail to provide for cases where the insured voyage was between enemy ports or between an enemy and a neutral port. It was only *Furtado* v. *Rogers*[10]

1. *Janson* v. *Driefontein Consolidated Mines*, (1902) A.C. 484 at 502.
2. May on Insurance, section 39.
3. *Porter* v. *Freudenburg*, (1915) 1 K.B. 857 (C.A.).
4. *Seligman* v. *Eagle Insurance Co.*, (1917) 1 Ch. 519.
5. *Ingle (W.C.), Ltd.* v. *Mannhein Insurance Co.*, (1915) 1 K.B. 227.
6. *Esposito* v. *Bowden*, (1857) 7 El. & Bl. 763 Ex. Ch. : 119 E.R. 1430.
7. *Vide* 32 Law Quar. Review, page 373.
8. 33 Law Quar. Review, page 15.
9. 33 Geo. III, Ch. 27.
10. 3 B. & P. 191 : 127 E.R. 105.

that ultimately established the illegality of these insurances on the ground of their tending to frustrate or interfere with the carrying on of hostilities by the Government of the insurer.

This case was followed in 1802 by Lord Ellenborough in *Kellner* v. *Le Mesurier*[1] and in the course of his judgment, the Chief Justice said :

"A policy containing an insurance against British capture *eo nomine* would be illegal and void upon the face of it, as being directly and obviously repugnant to the interest of the state, having an immediate tendency to render ineffectual to the extent of the indemnity created thereby all offensive operations by sea, adopted on the part of His Majesty and subjects, for the purpose of weakening the strength and diminishing the resources of the enemy. And if an insurance by a British subject made in terms against British capture would be void, an insurance indirectly producing the same effect by the application of the general terms of the insurance to the particular event, that is, of British capture which has since happened must, we are of opinion, upon principle be equally illegal; and that no peril, the subject of insurance can be covered under the generality of the terms capture, detention of princess, or the like which could not, consistently with law be specially insured against in direct and express terms."

Where the whole cause of action in such a case—contract and loss—is complete before hostilities commence, then the British insurer is liable at the suit of a foreign assured after the conclusion of peace.[2]

Regarding the second class of cases, namely, insurance against the acts of the Government of the assured it was held as early as 1809 by Lord Ellenborough in *Conway* v. *Gray*[3], that the insurer cannot recover for the artificial reason that the acts of a Government are to be assumed to be those of all his subjects and that therefore, as a man cannot insure against his own acts, he cannot insure against those of his Government.

This fantastic reasoning continued to govern the later decisions until the fallacy involved in it was exposed in 1814 in *Flindt* v. *Scott*[4], which came on appeal before the Court of Exchequer Chamber. In 1862 the case of *Aubert* v. *Gray*[5] came before the Exchequer Chamber, where Earle, C.J., said :

"The assertion that the act of the government is the act of each subject of that government is never really true. In representative governments it may have partial semblance of truth, but in despotic governments it is without that semblance."

By this judgment Lord Ellenborough's theory of identity of the government and the subject was finally exploded.

Aviation insurance.—Aviation insurance is the latest form of insurance, and is still undeveloped . The owner of an aeroplane requires to be protected (*a*) against injuries to his person ; (*b*) against damage to his aeroplane ; and (*c*) in case he is a common carrier carrying passengers and goods against his liability to his passengers; and (*d*) against his liability to the owner of the goods. Passengers by air and owners of goods carried by air would like to be protected. To cover such cases, protection is now available by means of a policy of aviation insurance. For a form of aviation insurance policy, reference may be made to the Encyclopaedia of Forms, 2nd edition, Vol. VII, page 569.

Insurance against risks to third parties for surface damage requires special treatment ; and it is not voluntary but compulsory. The use of aircraft introduces original types of risks but the general principles of law governing insurance and the usual rules of interpretation and construction of policies remain the same. One or two cases on aviation insurance may be referred to. In *Dunn* v. *Campbell*[6], the question was as to the time when the policy attached. A proposal form provided that in consideration of premium, the insurers would pay £5,000 in the event of the death of the assured by an accident, "during 12 hours in the Tarrant machine not exceeding a period of three months from the date and time of first flight." The assured lost his life in an accident to the machine at the commencement of its first flight. The accident happened when the pilot was attempting to rise but before he left the ground. It was held that the policy attached when the pilot

1. (1803) 4 East. 396 : 102 E.R. 884.
2. (1812) *Flindt* v. *Waters*, 15 East. 260 : 104 E.R. 842.
3. (1809) 10 East. 536 : 103 E.R. 879.
4. (1814) 5 Taunt 674 : 128 E.R. 856.
5. (1861) 3 B. & S. 163 : 122 E.R. 62.
6. (1920) 4 Ll. L.R. 36.

attempted to rise from the ground as the flight began then. In *Alliance Aeroplane Co.* v. *Union Insurance of Canton*[1], an aeroplane was insured for £5,000 on a flight from Hounslow to Australia. According to the terms of the "inform" clause on the cover note, which in this case was inadvertently omitted from the policy, the risk covered was "usual trial flights." The plane, 20 minutes after it left Hounslow, met with an accident and was completely destroyed. It was held that the flight to Australia was outside the risk covered. As there was a clause in the policy excepting racing risk and as the aeroplane was engaged in a race, the plaintiff failed to recover on that ground also.

Compulsory third party insurance of aircraft for surface damage.—Another form of insurance of recent origin is compulsory, namely, third party insurance for surface damage. The development of aerial navigation brought before the nations of the world the problem whether the air space over a state was to be free to all nations, or whether the sovereignty of states is to be extended to the air space over them on the basis of the legal maxim "*Cujus est solum ejus et usque ad coelum et ad inferos* (in whomsoever is the soil, his it is to the vault of heaven and to the regions beneath). With a view to arrive at a settlement internationally, the conference of Paris of 1910 was held ; and owing to a conflict of opinion between the British delegates who claimed that the sovereignty of states should extend over the whole air space above its territories *usque ad coelum*, and the German delegates who claimed absolute freedom over the whole air space, the conference came to no definite conclusions. The Great European War of 1914 to 1919 reinforced the view of the British delegates at the Paris conference of 1910. The special committee which was appointed by the Civil Aerial Transport Committee in England in 1918 to advise as to the policy and necessity of legislation, in its report, suggested the possibility of requiring all foreign aircraft to insure against risks of damage to third parties as a condition of their registration and licence. The main committee in their interim report of 1919 thought that the possibility of surface damage done by foreign aircraft visiting England requires special consideration, seeing that unless an aircraft itself was damaged, the owner of it was in a peculiarly advantageous position to escape from the legal consequences of his act. Nothing followed upon these recommendations.

(*A*) *International.*—A convention at Rome for the unification of certain rules relating to surface damage was entered into between Austria, Belgium, Brazil, Czechoslovakia, Denmark, France, Germany, Great Britain, North Ireland, Guatemala, Honduras, India, Italy, Japan, Lithuiana, The Netherlands, Norway, Poland, Rumania, Salvador, San Marino, The Holy Sea, Spain, Switzerland, the United States of America, Turkey and Yugoslavia. The parties were called the high contracting parties. Article one provides that they agreed to take the necessary measures to give effect to the rules established by that convention. The purpose of the convention was first to limit the liability of aircraft engaged in international flight in and over the territory of the contracting states for any surface damage caused to them and secondly to provide for schemes of third party compulsory insurance that in those cases in which liability has been incurred there would be a reasonable prospect that the loss would be met. By Article 14 (*b*) of the Rome Convention of 1933, the operator of an aircraft may not avail himself of the provisions of the convention limiting his liability if he had not furnished one of the securities prescribed by the convention, or if the securities furnished were not valid, or did not cover the liability of the operator for the damage caused under the conditions and the limitations of this convention. By Article 4, "operator of the aircraft" means any person who has an aircraft at his disposal and who makes use of it for his own account. If the name of the operator is not inscribed in the aero-nautical register or in some other official document, the owner is deemed to be the operator until proof to the contrary. The security referred to in article 14 (*b*) may be any

1. (1920) 5 Ll. L.R. 406.

one of three kinds : (*a*) a policy of insurance, (*b*) a deposit, or (*c*) a bank guarantee.

With regard to the policy of insurance, article 12 (1) provided that every aircraft registered in the territory of a High Contracting Party shall for the purpose of flying above the territory of another contracting party, be insured within the limits fixed by article 8, in respect of the damages to which the convention relates with a state-insurance-institution or with an insurer authorised in the territory in which the aircraft is registered to undertake such risk. The limit in the said article 8 is at the rate of 250 gold French francs for every kilogramme weight of the aircraft, with a limit varying between a maximum liability of not less than 600,000 francs, and more than 200,000 francs. By article 12 (3) the indemnity by way of insurance must be first appropriated specifically and preferentially to the payment of compensation due in respect of the damages to which this convention relates.

By article 12 (2) the municipal law of each High Contracting Party may in whole or in part substitute for insurance another guarantee against the risk to which the convention relates.

By article 20 (1) the terms of the convention are applicable in all cases where damage is caused on the surface in the territory of one High Contracting Party by an aircraft registered in the territory of another High Contracting Party.

The first obligation undertaken by the parties to the Rome convention was that they would take the necessary measures to give effect to the rules established by the convention, *vide* article 12 (2) also.

(*B*) *Compulsory insurance of aircraft in the United Kingdom.*—The Gorrel Committee report presented to Parliament in 1934 recommended the introduction of a scheme of compulsory third party insurance or adequate alternative indemnity against the damage caused by civil aircraft to persons or property on the ground, provided that the liability for that damage was limited in amount in the manner similar to that of the Rome convention of 1933. This is what part III of the Air Navigation Act, 1936, purports to do.[1] The provisions of the Air Nagivation Act, 1936, correspond as closely as possible with the scheme as introduced in respect to motor traffic and contained in the Road Traffic Acts of 1930[2] and 1934[3]. The main provisions of the Air Navigation Act, 1936, part III (sections 15 to 22) relate to compulsory insurance of aircraft in the United Kingdom. Section 16 (1) provides that a person is not to fly an aircraft or cause or permit it to fly unless there is in force in relation to the flying of that aircraft proper cover for the liability which may be incurred for the surface damage to third parties. The section further provides that the cover contemplated by it is (*a*) a policy of insurance issued by an authorised insurer which insures the owner of the aircraft against all liability which he may incur in respect of damage or loss caused to persons or property on land or water by or by any person in, or any article or person falling from, the aircraft while in flight, taking off or landing ; or (*b*) a security given by an authorised insurer of securities, being a security which consists of an undertaking by the giver of the security to make good, subject to any restrictions or conditions specified therein, any failure by the owner of the aircraft to discharge any such liability. By section 17, the hirer of the aircraft is to be treated as owner where the aircraft has been demised in good faith, let or hired out for any period exceeding 14 days to any other insurer by the owner, and no pilot, commander, navigator, or operating member of the crew of the aircract is in the employment of the owner. By section 16, the provisions as to compulsory insurance are not to apply to an aircraft which at the material time is owned by a local or police authority. For the purpose of issuing a policy of insurance to cover the risks in respect of surface damage to third parties, an authorised insurer is an insurance company or an under-writer in whose case the requirements of the Assurance Companies Act, 1909[4], as amended with respect to deposit or guarantees by under-writers are complied with. Any person who flies or causes or permits any other person to fly an aircraft unless there is in force

1. 26 Geo. 5 & 1 Edw. 8, Ch. 44.
2. 20 & 21 Geo. 5, Ch. 43.
3. 24 & 25 Geo. 5, Ch. 50.
4. 9 Edw. 7, C. 49.

in relation to the flying of the aircraft by that person or that other person, either a policy of insurance or a security given by an authorised giver of security, commits an offence which is punishable with fine not exceeding £200 or imprisonment for a term not exceeding six months or with both such fine and such imprisonment.

Certificate of insurance.—Section 18[1] provides that with regard to the issue of a policy for the purpose of covering third party risks in the event of surface damage by aircraft the exact time at which the policy is covered should be mentioned. A policy of insurance is to be of no effect unless and until there is delivered by the insurer to the person by whom the policy is effected, or by the giver of security to the person to whom it is given a " certificate of insurance or certificate of security."

Rights and remedies in respect of policies.—The third schedule of the air navigation Act, 1936,[2] provides for the rights and remedies in respect of policies of insurances and the giving of securities in relation to third party liability in respect of surface damage by an aircraft. Para. 1 of schedule 3 provides that where a certificate of insurance has been delivered in connection with a policy of insurance, so much of the policy as purports to restrict or attach conditions to the insurance of any person insured by it as subject to what follows, to be of no effect with respect to any liability required to be covered by a policy under Part III of the Act of 1936.[2]

But nothing is to require an insurer to pay any sum in respect of the liability of any person otherwise than in or towards the discharge of that liability, and any sum paid by an insurer in or towards the discharge of any liability of a person which is covered by the policy by virtue only of para. 1, shall be recoverable hy the insurer from that person. But there may be limitations to the general prohibition against restricting or attaching conditions to the policy of insurance. It may have a term limiting the period of insurance, or limiting the loss or damage insured against, to loss or damage caused to persons or property in the United Kingdom or providing that the insurer does not undertake to indemnify the person insured in respect of any liability to pay compensation under the Workmen's Compensation Act.

Para. 1 (2) (*a*) (*vi*) of schedule III says that the insurer is to be at liberty to relieve himself from liability by providing that he will not be liable to pay any claim under the policy, if, at the time of the happening of the event which was the cause of loss or damage giving rise to the claim, a licence to fly was not in force in respect of the aircraft in connection with which the claim is made. Para. 1 (2) (*b*) provides that the insurer is also entitled to protect himself in a policy of insurance by providing that he shall not be liable to pay any claim in respect of any loss or damage which is caused or contributed to by conditions of war, riot, or civil commotion. Para. 2 (3) prescribes the statutory method by the use of which an insurer can relieve himself from liability in those cases in which the assured has obtained a policy by the non-disclosure of a material particular, apart from any provision in the policy which purports to enable him to do so.

When a policy is cancelled, the person to whom the certificate was delivered shall, within 7 days from the taking effect of the cancellation, surrender the certificate of insurance to the insurer or if it has been lost or destroyed send a written notice to that effect to the insurer.

Third party rights against insurers of aircraft.—The bankruptcy of the insured person is not to affect claims by third parties in relation to claims against them for surface damage which must be compulsorily protected by insurance. Where a certificate of insurance has been delivered in connection with a policy of insurance and the assured has become a bankrupt or if being a company is wound up or an order is made for the administration of the deceased assured's estate according to the law of bankruptcy, nothing is to affect the liability of the assured which is required to be covered, in accordance with part III of the Air Navigation Act of 1936 and at the same time nothing is to affect any rights under the Third Parties (Rights against Insured) Act, 1930,[3] which the person to whom the liability was

1. 9 Edw. 7, C. 49.
2. 26 Geo. 5 and 1 Edw. 8, C. 44.
3. 20 & 21 Geo. 5, C. 25.

incurred has against the insurer. In such a case of the assured's bankruptcy after he has incurred a liability to third parties, all his rights against the insurer are transferred to such third parties.

Compulsory insurance of motor vehicles against third party risk in the United Kingdom.—A policy of compulsory motor vehicle insurance is intended to protect the assured against his liabilities to third parties arising out of accident caused by the use of motor vehicles on the road. The liability may be for the death or bodily injury or for damage to property. In addition, the policy usually covers the vehicle and its accessories but it is only optional with the assured to insure the vehicle and its accessories. Under part II of the RoadTraffic Act, 1930,[1] provision is made for insurance against third party risks arising out of the use of the motor vehicles. Section 35 of the Act provides that it shall not be lawful for any person to use, or cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the use of the vehicle by that person and that other person as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of part II of the Act. Violation of this section is made punishable by fine not exceeding £50 or imprisonment for a term not exceeding 3 months. A person so convicted shall be disqualified from holding a licence to drive a motor vehicle for twelve months from the date of conviction.

Compulsory Motor Vehicles Insurance in India.—The Motor Vehicles Act IV of 1939 has made provision for compulsory insurance of motor vehicles against third party risks in Chapter VIII. But the chapter shall not have effect until the 1st day of July, 1943. Sections 93 to 111 deal with it. The provisions contained in those sections are somewhat similar to those contained in part III and Third schedule of the Air Navigation Act of 1936[2] and under part II of the Road Traffic Act of 1930[1]. No person shall use except as a passenger or cause or allow any other person to use a motor vehicle in a public place unless there is in force in relation to the use of the vehicle by that person or that other person a policy of insurance by an authorised insurer. This does not apply to any vehicle owned by the Central Government. A person issuing a policy of insurance shall be liable to indemnify the person specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons. In the event of the insured person becoming insolvent or in the event of an insured company becoming wound up, if either before or after the event any liability is incurred by the insured person, his rights against the insurer under the contract, notwithstanding anything to the contrary in any provision of law, be transferred to the third party to whom the liability was incurred. For further details, reference may be made to sections 93 to 111 of the Motor Vehicles Act IV of 1939.

War Risks Insurance.—On or about the outbreak of the recent war, a new kind of insurance known as "War Risks Insurance" has come into existence, in England in 1939 and in India in 1940. A similar scheme is being enacted by the Federal Government of the Commonwealth of the Australia now.

War Risks Insurance Act of 1939[3].—The object of the War Risks Insurance Act of 1939 is to cover marine risks and risks caused to sellers of goods and commodities. The Act is passed for making provisions for authorising the Board of Trade, during war time, to undertake the re-insurance and insurance of ships, and of cargoes in such ships or aircraft; for the payment of the Board of Trade, in time of war, of compensation in respect of such goods lost or damaged in transit and for requiring persons who are sellers of goods to insure against war risks. For the purpose of seeing that the ships are not laid up and commerce not interrupted by lack of insurance facilities the Board of Trade may make agreements with any person for insurance of any King's enemy risks against which a British ship or cargoes on it or on an aircraft are exposed for the time being. The Board of Trade may also make agreements for insurance of goods while they are in transit within the United Kingdom and Isle of Man having been consigned to those places from outside,

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1. 20 & 21 Geo. 5, C. 43.
2. 26 Geo. 5 and 1 Edw. 8, C. 44.
3. 2 & 3 Geo. 6, Ch. 57.

or while they are in transit in a place outside the United Kingdom and Isle of Man having been consigned to those places outside from the United Kingdom and Isle of Man. Further in the event of war, the Board of Trade may, by notice published in such manner as the Board thinks fit, put into operation also a scheme known as, "The Commodity Insurance Scheme" whereby the Board undertakes, in the United Kingdom, in relation to the person carrying on business as seller of goods, in the United Kingdom, the liabilities of insuring such persons against war risks in respect of such goods. A premium will have to be paid and it will be recoverable as a civil debt. After the "Commodity Insurance Scheme" has been put into force, the Board may make an order, prohibiting the seller of such goods from carrying on any business in the United Kingdom unless there is in force an insurance in respect of them. Agricultural products and cattle-stock are also included in the term "goods."

War Damage Act.—The War Risks Insurance Act of 1939 applies only to movables. The English War Damage Act, 1941,[1] was enacted to cover damages caused by war to immovable property. By this Act a percentage of compensation and not full compensation for loss caused to such property is assured by the State to the owner or the person entitled to it. The proportion of compensation actually payable will be decided by Parliament.

Indian War Risks Insurance Ordinance, No. IX of 1940.—To cover war risks against certain kinds of goods mentioned in the schedule to the Ordinance, the War Risks Insurance Ordinance No. IX of 1940 was passed. From 1st October, 1940 to 1st November, 1940, it was only optional, but from 1st November, 1940, it was made compulsory in respect of goods above Rs. 20,000 in value. Roughly speaking, the Act excludes all goods which cannot be destroyed at all or which could be very easily destroyed by fire. The rate of premium payable at the commencement of the Ordinance in 1940 was one anna for every Rs. 100. Later it has been raised to 2 annas, the increase being due to the nearer approach of danger. The Government of India have now definitely decided to introduce legislation at an early date to cover the establishment of a war risk insurance scheme to cover buildings, machinery and plant of factories. An important point is that the principle followed is that of a fixed single premium payable by instalments. The rate of premium will be uniform for all factories wherever situated and insurance will be compulsory.

Special War Time Property Insurance in the Commonwealth of Australia.—Probably the scheme of insurance, known as Special War Time Insurance, that is being introduced by the Federal Government of the Commonwealth of Australia is more comprehensive as it includes all kinds of movables and immovables, inclusive of commodities, plant, machinery, office furniture, business and professional equipment, live-stock, crops, trade-stock, fencing, private chattel such as personal effects and home furniture and fixed property of all kinds of buildings. The scheme of insurance is compulsory to all such property whose value exceeds £1,000 but voluntary if its value is below £1,000. In regard to all property except buildings and fixed property, the Federal Government will insure conjointly with private insurance companies. As regard buildings and fixed property, the Federal Government will alone insure. All private-war-damage insurance will cease when the Federal Scheme comes into operation. An expert commission, styled as the Federal War Insurance Commission will fix the rate of premium and of payment for services rendered by private companies. Insurance of buildings and fixed property will be effected through a separate fund. All owners of buildings and fixed property will contribute to the fund at an initial rate of 4 shillings per £100 per annum on the capital value. Churches and schools, public hospitals and charitable institutions are covered free of charge. Any surplus in the amount collected will be utilised for post-war purposes. A scheme similar to this may be brought into force in India.

[*Concluded.*]

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1. War Damage Act, 1941, 4 & 5 Geo. 6, 1941.

SUMMARY OF ENGLISH CASES.

In re., St. James' Court Estate, Ltd., (1944) 1 Ch. 6.

Companies Act (1929), *section* 46 (1)—*Conversion of issued preference into redeemable preference shares by scheme of arrangement—Not authorised by section* 46 (1).

The conversion of issued preference shares into redeemable preference shares is clearly not within the Companies Act, 1929, section 46 (1) which says: ". . . . . a company limited by shares may, if so authorised by its articles, issue preference shares which are or at the option of the company are to be liable to be redeemed". A conversion of that kind can take place only if the steps appropriate to a reduction and simultaneous increase of capital have been taken.

Burrows, *In re. Ex parte* Official Receiver *v.* Steel, (1944) 1 Ch. 49.

Bankruptcy—Debtor absenting himself with intent to delay and defeat creditors—Act of insolvency—Relation back of trustee's title—If can extend beyond three months before petition.

On May 1, 1942, with intent to defeat or delay his creditors the debtor departed from his dwelling house and on a creditor's petition, dated the 20th October, 1942, a receiving order was made on December 1, 1942. On a question as to the relation back of the title of the trustee in bankruptcy under section 37 (1) of the Bankruptcy Act, 1914,

Held: The absenting of a debtor with intent to defeat or delay his creditors is a continuing act of bankruptcy. But the trustee cannot in view of section 4 (1) of the Bankruptcy Act rely on any act of bankruptcy which occurred more than three months before the date of the presentation of the petition.

Accordingly the trustee in bankruptcy cannot claim his title as from May 1, 1942. The period of relation back is limited to three months before the presentation of the petition.

Ashworth *v.* McGuirk & Co., Ltd., (1944) 1 K.B. 1 (C.A.).

Factory Act—Docks Regulations 1934, *rule* 43—*Duty of employer to employ signaller during unloading of ships—Absolute duty—Injury to workman during temporary absence of signaller—Liability of employer.*

The Docks Regulation, 1934, rule 43 requires that a signaller "shall be employed" during unloading of ships. Under the Regulation the employer should not merely enter into a contract appointing a man to act as signaller, but is under an absolute obligation to keep the man there doing the work. The words "shall be employed" must not be regarded as being satisfied by the mere existence of a contract of employment but they are used rather in the sense of the man being actually engaged in the operation than being employed contractually to carry it out. Accordingly where a workman is injured during the temporary absence of the signaller in the course of his employment the employer is liable for the breach of the statutory obligation to "employ" the signaller.

Dickinson *v.* St. Aubyn, (1944) 1 K.B. 10.

Lease—Lease for a term of seven years with proviso for its determination at the end of five years if the tenant should so desire—Covenant for decorative repairs to be executed by tenant in the last quarter of "said term"—Tenant exercising option to determine lease at the end of fifth year—Liability to carry out repairs under the covenant.

A lease for a term of seven years with a proviso for its determination by the tenant at the end of five years if the tenant should so desire contained a covenant for decorative repairs to be executed by the tenant in the last quarter of the "said term". The tenant who had exercised the option to determine the lease at the end of five years contended that only the *habendum* must be looked at and as the *habendum* provided that the lease is to be for seven years the tenant's liability to execute the repairs does not arise unless the lease runs for that period and that the proviso cannot enlarge his liability.

Held, negativing the contention:—The proviso is one of the strongest ways in which an intention to create a condition can be expressed. If the lessee exercises the option given by the proviso the last quarter of the term becomes the last quarter of the fifth year and the landlord is entitled to enforce the covenant to execute decorative repairs,

BISHOP & BAXTER *v.* ANGLO-EASTERN TRADING & INDUSTRIAL CO., LTD., (1943) 2 All.E. R. 598: (1944) 1 K.B. 12 (C.A.).

Sale of goods—Contract—Acceptance of offer "subject to war clause"—If completed contract.

An offer from an intending purchaser of goods was accepted by the seller "subject to war clause". There were many kinds of war clauses in use and it did not appear that any particular war clause was in the minds of the parties. In the circumstances, *held,* that there was no completed contract as there was no *consensus ad idem.* 33 T. L. R. 475, followed.

LEAVEY & CO. *v.* HIRST & CO., LTD., (1944) 1 K.B. 24 (C.A.): (1943) 2 All.E.R. 581.

Practice—Trial of suit—Deviation from pleadings—Duty to have pleadings appropriately amended.

Contract—Sale of goods—Damages for breach in respect of goods not replaceable—Measure of.

It is the duty of both judge and counsel on both sides to see that the pleadings are amended if there is to be a substantial departure from the pleadings at the trial of the action.

In respect of a breach of contract for sale of goods which cannot be replaced in the market, the purchaser is entitled to have as damages the profit which he would have made if the contract had been carried out.

WARE *v.* GARSTON HAULAGE & CO., LTD., (1943) 2 All. E. R. 558 (C.A.): (1944) 1 K.B. 30.

Tort—Lorry with trailer left on the road without a light in the night—Motor-cyclist colliding with it—Liability of owners of lorry.

If a lorry was left on the road with the trailer in fact unlighted so that it could not be seen, in the night it would be a dangerous obstruction in the road and a nuisance. If the light had gone out after being left there it is the misfortune of those responsible for seeing that the trailer was lighted but not a reason for saying that a motor-cyclist who drove into the lorry and sustained injuries is not entitled to recover damages. The plaintiff is entitled to succeed even apart from any question of negligence.

FIELD *v.* HOPKINSON, (1944) 1 K.B. 42.

Criminal trial—Breach of statutory "obligation to keep or cause to be kept an accurate record" of sales otherwise than by retail—Charge of—If bad for uncertainty.

If an enactment forbids the doing of act *A* or act *B,* it creates two offences and a conviction on one information charging both in the alternative is bad for uncertainty, but if the enactment creates a duty to do either *A* or *B,* there must to constitute an offence, be a failure to do both acts.

Where a person is charged with having failed "to keep or cause to be kept an accurate record" of purchases, sales and stocks as required by an Emergency order in respect of certain goods, that person can be convicted on the charge. It cannot be said that such conviction will be bad for uncertainty as the charge was of one offence only and of two offences in the alternative.

LUBORSKY *v.* SNELLING; and, COHEN *v.* SNELLING, (1943) 2 All. E. R. 577 (C.A.): (1944) 1 K.B. 44 (C.A.).

Fatal Accidents Act (1846), *section 3—Limitation of one year under—If can be pleaded by an insurance company which has admitted liability during the negotiations.*

On 28th December, 1940, the respondent driving a motor car negligently ran into the husband and step-daughter of the appellant when the two were walking on the footpath and caused injuries to them. The husband died next day. The defendant was a serving soldier. Negligence could not be disputed. The respondent, as the driver, was insured against third party liability as required by the Road Traffic Act, under a policy taken out by his employers as owners of the motor car. Negotiations proceeded between the insurance company and the appellants' solicitor on the basis of admitted liability. An action

had to be taken for apportionment of damages. A first action had to be withdrawn as letters of administration had not been obtained, and the action commenced after the obtaining of letters of administration was more than twelve months after the death.

Held: That the defendants were debarred from relying on the plea of limitation under section 3 of the Fatal Accidents Act as the liability had been admitted.

CARLTONA *v.* COMMISSIONERS OF WORKS AND OTHERS, (1943) 2 All.E.R. 560 (C.A.).

Defence Regulations—Requisitioning of premises by competent authority—Court has no power to inquire into the reasonableness, policy, the sense, etc., of the transaction.

In respect of a requisitioning of premises under the Defence Regulations; *Held*: Where a regulation commits to an executive authority the decision of what is necessary or expedient and that authority makes the decision, it is not competent to the Courts to investigate the grounds or reasonableness of the decision in the absence of an allegation of bad faith. If it were not so, it would mean that the Courts would be made responsible for carrying on the executive government on these important matters. All that the Court can do is to see that the power which it is claimed to exercise is one which falls within the four corners of the powers given by the legislature and to see that those powers are exercised in good faith. The Court has no power to inquire into the reasonableness, the policy, the sense or any other aspect of the transaction.

BLACKWELL *v.* BLACKWELL, (1943) 2 All.E.R. 579 (C.A.).

Husband and wife—Separation—Money paid by husband to wife for expenses of housekeeping while living together—Savings out of—Right of husband to.

Savings made by a wife out of money allowed to her by her husband for housekeeping purposes belongs to the husband. On a separation between them the money so saved standing to the wife's credit in a bank account will be treated as property of the husband.

KENNEDY *v.* DANDRICK, (1943) 2 All.E.R. 606 (Ch.D.).

Practice—Action to set aside judgment on the ground of fraud—Plaintiff cannot be put on terms as a condition to proceeding with his action—R.S.C., Order 27, rule 15 *and Order* 36, *rule* 33*—Applicability.*

A judgment which it was alleged was induced by fraud is not a judgment delivered by default within the meaning of R.S.C., Order 27, rule 15. In an action to set aside a judgment on the ground of fraud it is not open to the Court to put the plaintiff upon terms as to costs and deposit of moneys in Court as a condition of proceeding with his action.

HOCKIN *v.* AHLQUIST BROTHERS, LTD., (1943) 2 All.E.R. 722 (K.B.D.).

Evidence—Best evidence to be produced—Limits to supposed rule—Evidence of people who have seen them as to condition of chattels in issue—Admissibility—Production of the chattels—Not essential.

Evidence about the nature of chattels can be given by people who have seen them and can speak to their condition. To suppose that there ought to be produced in Court all the articles about which issues are raised in a great variety of cases would lead to consequences which would show how impossible the rule would be in practice. Accordingly in a charge of breach of the provisions of the Making of Civilian Clothing (Restrictions) Order 1942, by making garments with more than the permitted number of pockets and buttons, the charge can be sufficiently proved by the evidence of the officer who had seen the clothing, and production of such clothing is unnecessary.

(1892) 2 Q.B. 113 and L.R. 2 C.C.R. 128, relied on.

JOTTINGS.

THE MADRAS PROVINCIAL LAWYERS' CONFERENCE, KUMBAKONAM.

Presidential Address delivered by Sir Alladi Krishnaswami Aiyar.—This is the second occasion on which I have the pleasure and privilege of addressing a gathering of lawyers in this notable city of South India, the first occasion being shortly after I was appointed Advocate-General of this Province in the year 1929. I thank you most heartily for the

honour you have done me and for the opportunity you have afforded me on this occasion by even postponing your deliberations to suit my convenience.

There are various problems in which the legal profession is interested—a sound system of legal education which would ensure a high standard of efficiency on the part of an entrant into the profession, and also promote the academic pursuit of law as a social science; the problem of over-crowding and undercutting; the regulation of fees with due regard to the interests of a skilled profession and of the litigant public; the need for organised help to members of the profession who, through no fault of their own, might fall on evil days; the promotion of *espirit de corps* among the members of the profession not in a sectional or class-spirit but in a spirit of service to the public. To a very large extent, some of these problems relating to a Bar extending over a whole presidency will have to be solved locally with tact, wisdom and a sense of fair-play.

In dealing with the subject of professional ethics and rules of conduct and advocacy, without in any way minimising the importance of the rulings of Bar Councils, the resolutions of professional associations, or the guidance given by the judges from time to time, what needs emphasis is that common honesty, straight dealing, active sympathy with our struggling brethren, and a genuine appreciation of talent wherever found, are principles universal in their character and applicable to every walk of life.

In regard to the subject of legal education in this Presidency I am very keen that the standard should be kept as high as possible with the back-ground of a high general education and culture. One has no right to enter the profession and claim to minister to the needs of the public without the necessary equipment and training. Incessant study, scrupulous attention to the interests of the client, fair dealing with the Court and a spirit of independence in espousing the cause of the client without fear or favour, must continue to be the watchwords of every entrant into the profession. In the complex conditions of modern society, departments of the law are getting ramified and specialisation of some sort has become inevitable. There is need for specialists in Commercial law, Banking, Insurance and Income-tax law. The subjects of Constitutional and International law have also assumed special importance.

There is a sacred and most important function of the profession which I cannot refrain from alluding to in this gathering of lawyers, *viz.*, its function as the guardian of the civil liberties of the people in normal times and during times of war of such liberties as are vouchsafed to them consistently with the due prosecution of the war. It is an old adage (none the less true because it is old) that eternal vigilance is the price of liberty. In these days of Ordinances, of innumerable Acts, Rules and Orders, passed by various authorities which are legion, regulating the life and liberty of the citizen, I would appeal to every Bar Association to equip itself with the necessary materials to enable the members of the profession to serve the interests of the clients with efficiency and promptness. While there is no need for the profession to assume in every case that there is wilful default or transgression of the law on the part of the authorities, the profession need not be under the impression either that the authorities are always keeping themselves strictly within the limits of the law. In democratic as well as non-democratic countries, it is common knowledge that administrative law is occupying a wide field at the present day. This tendency is manifest in England, in the Dominions, and in America, in spite of its constitutional doctrine of the separation of powers. Despite the protests of Lord Wright and Lord Hewart in the pre-war period, I have very great doubts, having regard to the schemes of large-scale planning and industrial re-construction, and the need for devolution of authority in the post-war world in the interests of efficiency, whether there is any reasonable likelihood of an abatement of this tendency even after the war. India is no exception to the rule and there is no likelihood of its following a different track. Under the present constitution, there is a further point to be noticed in regard to the Indian scheme of Government. The Governor-General is invested with supreme powers of legislation co-extensive with those of the Indian Legislature, and the effect of the recent decisions of the Federal Court is that there is no difference in substance between the powers of the Indian Legislature and those of the Governor-General in regard to the Ordinance-making power. It may be of interest to you to note that within the last few years there is hardly any subject of importance in regard to which the Ordinance-making power has not been invoked and that the total number of Ordinances passed by the Governor-General far outweights the number of Acts passed by the Indian Legislature. There is no similar authority anywhere in the English-speaking world who has anything like the powers of legislation of the Governor-General. I would suggest the formation of Committees in every Bar Association who will make a special study of particular branches of statute law and offer their suggestions for their modification, repeal, or amendment.

The idea also of a panel of lawyers willing and ready to offer their services when the liberty of a subject is threatened must be carefully considered by every Bar Association in this Presidency. The administration of criminal justice on sound lines is of even greater importance than the administration of civil justice. How greatly the value of the services of a lawyer is appreciated in the maintenance of liberty will be clear from the construction

put upon the due process clause by the Supreme Court in the United States. You are aware that, under the scheme of the American Constitution, the administration of criminal law is outside the concern of the Federal judiciary and the Federal Government. Errors of procedure, incorrect appreciation of the principles of criminal law and the admission of even inadmissible evidence leading to a miscarriage of justice can only be corrected by State Courts. But a denial of the right of a citizen to be represented by Counsel in the course of the hearing of a cause, civil or criminal, is regarded as offending the due process clause in the constitution and the Supreme Court has held that any legislation denying the right of a citizen to be represented by Counsel is *ultra vires* and unconstitutional. In the words of Justice Sutherland, "the necessity of Counsel is so imperative that the failure of a trial Court to secure an effective appointment of Counsel is a denial of due process." You may be interested to know that even in Russia, under the Advocacy Act of 1922 and the Judiciary Act of 1926 with its sweeping reforms in regard to the judiciary and procedure, a collegium of lawyers was created and its members were made responsible for the legal aid of a party put up for trial. The collegium is a self-governing institution along the lines of other Soviet institutions. I would ask you, gentlemen, to carefully study recent enactments in this country, the extent to which legal aid is allowed or denied, and the restrictions, if any, on the freedom to engage Counsel, and zealously guard the rights of the public and in so doing of yourselves. The air is full of the freedoms for which the United nations are fighting. While the extent to which these freedoms are permitted depends upon the law of the land for the time being, the zealous guarding of such freedoms as are recognized is in your hands. In this connection I may make a passing reference to the fact that while in England and I may add in India also, Freedom of the Press and Freedom of Conscience are common law rights subject to interference by the legislature, under the American Constitution they are constitutional rights which cannot be interfered with by the legislatures. The American citizen has thus secured to him a much greater freedom of religion, expression and assembly than even the people of Great Britain enjoy.

Earlier in my address I have alluded to the importance of the study of Constitutional Law, International Law and Comparative Jurisprudence. I have heard oftentimes the remark that International law has lost all its meaning and sanction at the present day, at any rate the study of International law is not the concern of a subject nation. I do not share that view. I am confident that when the united nations succeed, as they are bound to and as they must in the interests of a better future for this world, there are likely to be profound and far-reaching changes in the main concepts of International law. Even as the war is being waged, the whole conception of neutrality based upon the theory that each nation is sovereign in its own sphere, and that war between two nations, whether one party or the other is in the right, is no concern of other nations, is undergoing radical changes. The League Covenant and the Kellog Pact prior to the War, the formulation of differential attitude and policy adumbrated by America towards the belligerents during the progress of the War have given a serious blow to the theory of neutrality as propounded by earlier writers on International law.

Closely allied to the earlier conception of neutrality in war is the theory that the kind of Government obtaining in a particular country or in particular parts, say, of the British Commonwealth or of the British Empire is no concern of the other nations. This theory is open to challenge if only on the ground that the war is being fought out avowedly for certain basic principles and that the future peace of the world depends as much upon democratic forms of Government being established and secured in Asia as in Europe. Asia cannot be segregated from Europe nor can India, China and West Asia be segregated from one another. There is the hard fact of peoples with ancient civilizations breathing the air of new ideas of freedom and yearning for a new dispensation in Asia as in Europe. The future peace of the world cannot be secured if any theory of domination of one race over another is still to hold the field or if democracy is to be the ruling principle of Governments in Europe and not in Asia or if the old system of secret treaties, special alliances, and zones of influence is to continue.

I would also impress upon my lawyer friends the need for a study of constitutional problems not merely in the British Commonwealth but in the Americas and elsewhere with a view to assist the solution, and not the creation, of fresh difficulties. In this connection I would remind you of an incident reported in the books that on the eve of the formation of the South African Union after the Transvaal War, when the delegates met under the presidency of the then Chief Justice of South Africa, they made a resolve not to leave the place of meeting until and unless a solution was reached in regard to the formation of the Union.

There is one other subject which merits your special study and that is Comparative Jurisprudence including Soviet Jurisprudence. Leaving aside the Soviet attitude to property and the reconstruction of society on an entirely new basis, I have been much struck by the experiments made in Russia, as narrated in recent books on the subject, in the field of criminal jurisprudence, the reform of the criminal and the re-shaping of him into a useful and enlightened citizen.

Having ventured on certain observations of general interest, I should like to say a word or two in regard to matters of immediate practical interest to you. There is no denying the fact that the judicial system and the legal institutions in this country have been built on the model of English institutions. If the main principles of the English judicial system are not to be kept in view in the fashioning of legal institutions and in the recruitment to the judiciary, you rob the system of its chief merit. The English method of recruiting to the Bench and the English case-law system are closely inter-connected. Even in matters where the law has been codified (*vide* the Sale of Goods Act, the Partnership Act and the Bills of Exchange Act), codification is built on a whole mass of case-law which has to be rummaged to understand the implications of particular sections. If the English system of the administration of justice deservedly stands high in the matter of judicial independence and the intellectual grasp exhibited by the judges, it is not a little due to the fact that a judge recruited from the Bar is able easily to master the complexities of a complicated litigation. But, for the system to succeed it is necessary that the recruitment should rest on merit and merit alone. There is no point in recruiting an indifferent lawyer from the Bar with no particular pretensions to legal ability or training, merely because he is a lawyer presumed to be practising at the Bar. The insistence upon ability of a high order does not of course imply that no importance is to be attached to character, integrity and similar factors which of course are taken for granted in any selection.

There is one other subject to which I may make a passing reference and that is, the relations between the Bench and the Bar. Generally, it is gratifying to note that harmonious relations subsist between the Bench and the Bar of this Presidency. Both the Bench and the Bar are sister institutions engaged in the very important task of the administration of justice in which the primary party concerned is the citizen or the litigant. Any discord between the two institutions should be viewed with concern by the Bench and the Bar alike, as that might defeat the main purpose for which the institutions exist. The Bench need not suffer from any superiority complex nor the Bar from any inferiority complex. The Advocate will have to discharge his duties fearlessly and to the best of his ability. The Judge will have to hold the scales even remembering always that the primary parties concerned are the litigants whose cause comes up for decision before him. Occasionally we hear of a breeze in Court, of a resolution passed by a Bar Association in regard to the temper exhibited by a judge. I trust that such instances will be few and far between and that the great moral purpose underlying the administration of justice will be kept in view by the Bench and the Bar alike.

There is only one other topic which I would allude to before I close my remarks,—and that is a matter which has been engaging the attention of the Bar and some of the Bar Councils—namely, the right point of approach in regard to the proceedings to be taken against members of the Bar who have been convicted of political offences not involving violence. Under the law as it stands and as interpreted by the Madras High Court for the last several years, any person convicted of a political offence, whether involving violence or not, is liable to be disenrolled, though a somewhat different view has been taken in the decisions of the Calcutta High Court. It is urged with considerable force that the procedure adopted involves a double punishment which is uncalled for. This subject merits your serious consideration and you will have to see whether it is possible to urge upon the Government to amend the Bar Councils Act so as to make it clear that a mere conviction for a political offence not involving violence should not carry with it a liability to be struck off the rolls or to be otherwise punished under the Bar Councils Act.

I would close my address with a reiteration of some of the views which I have given expression to on other platforms and on other public occasions. Law is a social science. It is not and cannot be static in its character. There is a danger of a lawyer being imprisoned by his own learning. There is the necessity for old principles being re-formulated to suit a new age and receiving an accession of fresh vitality and strength. Time and again there must be a reassessment of values to suit individual and national welfare. Law reform ought to be as much a subject of interest to the practising lawyer as advocacy in Court as there are natural limitations to judge-made law in keeping pace with the progress of society. It is only when the lawyer discharges this double duty that he will justify himself as a member of an enlightened profession and as a useful citizen.

Unveiling of Sir A. Krishnaswami Aiyar's portrait.—A pleasant function took place, when on the 25th April, a life-size portrait of Sir Alladi Krishnaswami Aiyar—the gift of the Sir Alladi Krishnaswami Aiyar Sashtiyabdapurthi Celebration Committee to the Madras Advocates' Association—was unveiled by Sir M. Venkatasubba Rao at the premises of the Advocates' Association in the presence of a large and distinguished gathering of Judges and lawyers.

Mr. T. R. Venkatarama Sastriar, the President of the Sashtiyabdapurthi Celebration Committee, in requesting Sir M. Venkatasubba Rao to unveil the portrait referred to the eminence of Sir Alladi as a lawyer, the high distinction that he had achieved in Madras and before the Federal Court and the great services he had rendered to the legal profession.

In unveiling the portrait, Sir M. Venkatasubba Rao said:

"Let me first pay my tribute to Mr. Chamkur the talented artist who has executed this portrait with complete fidelity. This would be a treasured addition to the portraits adorning your walls and Sir Alladi would be among the most illustrious of this galaxy of talent.

Mr. Chamkur has portrayed the outer man. I wonder whether to delineate the inner man—the mind and soul of Sir Alladi—devolves on me. I shall depict him to-day as a lawyer mainly, for I have known him well in that capacity. I do not possess the same intimate knowledge of his moods and dispositions in private life and on this aspect I shall touch but briefly.

During the 17 years I was on the Bench he appeared before me constantly and I believe some of his most notable performances were in my Court. When a judgment is produced—and in my opinion a judgment should be a finished product both for matter and style—it is hardly realised how large the lawyers' contribution is to that judgment. Speaking for myself, I am greatly beholden to the Bar and I take occasion to pay public tribute to Sir Alladi, for, he was among the two towering personalities, the other being Sir S. Varadachari, from whom I obtained the greatest assistance.

This illustrates the inter-dependence of the Bench and the Bar. Courtesy, regard and reverence should be reciprocal and not onesided, as they often are. If the Judge makes the lawyer feel as though he is on his trial, the loser by it is more the Judge than the lawyer. It is confidence and not fear that the Judge should inspire. It is the clash of views freely interchanged in good humour that would produce the best result. Without an independent Bar an independent Bench is a delusion. A brow-beating or heckling Judge denies himself through his own conduct the advantage of a fearless and stimulating argument.

Now let me turn to Sir Alladi. Lord Macmillan refers to "diversities of greatness" and to "dissimilar talents". No two great men are alike. And a student of human nature should ask himself in regard to a particular man: what are his special traits which led to his eminence? In the case of Sir Alladi, what are those characteristic talents, those traits of intellect, which have brought him such astonishing success and renown?

He has an amazing faculty for reading the judicial mind and putting it to every legitimate use. I was on the Election Tribunal, I think in the early part of 1921, some months before my appointment to the Bench. Mr. Justice Coutts-Trotter and Mr. Anantakrishna Iyer were the other members of the Bench. There was something in the atmosphere of the Court which, wrongly as the sequel proved, pre-disposed Mr. Justice Coutts-Trotter to a particular view. I well recall how Sir Alladi probed his mind and with infinite dexterity tried to wrest a verdict favourable to him.

Here comes back to me a very pleasant reminiscence. After my work on the Election Tribunal, I returned to the Bar. I then heard it said that Sir Alladi remarked that if I were raised to the Bench (there were rumours then to that effect) they would find me a strong-willed (did he say, I wonder, self-willed?) and determined Judge. I leave it to you to say how far that prophesy was fulfilled.

Let me revive another memory which is extremely vivid in my mind. The question was whether a day's delay in the presentation of a heavy first appeal occasioned by the lawyer's fault should be excused or not. Had the matter come up before Oldfield, J., he would have without compunction decided the point in the negative. Had it come up before me, I would have with equal readiness answered it in the affirmative. Such matters do not occupy more than a few minutes of the Court's time. As it happened, the matter was posted before Oldfield, J., and myself, Sir Alladi having been engaged to oppose the presentation of the appeal. With his unerring instinct fathoming Oldfield, J.'s thoughts, he poured out for about four hours a wealth of learning to confirm him in his view. To complete the story, Oldfield, J., finding that I was as adamant as himself, directed the case to be posted before Spencer, J., and myself, with the result that in a twinkling we excused the delay and admitted the appeal.

Many memories come back to me to-day from those crowded years. Numerous wrestling bouts I had with Sir Alladi and when his super-subtlety was directed towards impeding what I considered justice, I used to wrestle with him and I am glad to say in most cases I won, for no better reason than I could claim the last word. I refer to these instances to show that one of his great gifts is an insight into the working of the judicial mind.

I would next refer to his amazing power of comprehension. No matter how intricate, involved or abstruse the point, he would grasp it at short notice. There is no legal question which eludes his searching brain and he would illuminate it with his profound learn-

ing and intelligence. No one could spring a surprise on him and with his unfailing resourcefulness he was ready for any emergency.

Combined with this is his power of conception, a faculty of forming ideas, of conceiving new positions on the spur of the moment. Where one would think nothing could be said, he would formulate a startling theory, something fresh and unexpected, and develop and amplify it till what had appeared at first a mere phantom became a reality. This makes him a formidable opponent and he has had few adversaries who reach his high level.

He has a mind of great range. He is a reservoir of legal knowledge. His reading has been wide and comprehensive. He is a votary of law who served that goddess with single-minded devotion and on whose altar he sacrificed health, comfort and pleasures which are so much valued.

Sir Alladi is as much a great advocate as a great lawyer. I am tempted to compare styles of advocacy and four names occur to me—Mr. Rangachari, Sir C. P. Ramaswami Aiyar, Sir S. Varadachari and Mr. Nugent Grant. Mr. Rangachari marshalled his facts with wonderful skill and it was a treat to hear him. Sir C. P. Ramaswami Aiyar appeared before me in two heavy cases just before he deserted the bar and for sheer eloquence I would rank him high. Sir S. Varadachari would re-create with the aid of a lively imagination forgotten scenes. And Mr. Nugent Grant's sweet flow of words was bewitching. As to Sir Alladi, his delivery lacks artistic finish and in the heat of argument he forgets (shall I say disdains?) symmetry and finesse though he has literary gifts of a high order which he reserves for other occasions. His forensic utterances are marked by force, vigour and virility. They are a succession of hammer strokes delivered with giant strength suggestive of a powerful personality of massive build unlike Sir Alladi in the flesh, as we know him. He is challenging and aggressive and I can never forget his incredulous look when facing the judge, as though he meant to say "how can you help agreeing with me. If you do not, you are of course wrong".

What is the great lesson of his life? He was a most industrious and painstaking student. The reason for numerous failures is that aspirants find themselves unequal to the occasion due to want of forethought and consequent lack of preparation. In the case of Sir Alladi, through intense application he acquired mastery of the law. You cannot wait until a case, say involving insurance law presents itself, to study that subject. If you do so the opportunity is lost. There was a tide in the affairs of Sir Alladi which being taken at the flood led on to fortune. There is a saying of Disraeli (an epitome of his own life) that the secret of success is for a man to be ready for his opportunity when it comes. So when opportunity opened the door, his rise was meteoric. I remember how he fascinated the junior Bar who would crowd to listen to him, and to them I would say emulate this great quality of his.

Now let me turn to Sir Alladi as a man. Mr. Venkatarama Sastri has referred to Sir Alladi as not being an impressive figure. It means that he seized success without adventitious aids—a commanding presence, a silvery voice or a stately bearing—and greater therefore is his title to fame.

He gives the impression of remoteness from private or personal affairs and seems so obsessed by law and things pertaining to intellect only. But this seeming unconcern veils a very practical and sagacious turn of mind. He is a shrewd judge of men and affairs with an understanding of the springs of human action which is astonishing. The comments he makes in private on his colleagues, or judges or on public men are marked by a profundity of thought which reveals a penetrating mind. His remarks on such occasions are not only illuminating but sprightly, crisp and cutting.

Sir Alladi has risen from humble beginnings and is not ashamed to refer to the fact—by itself, in my opinion, a noble trait. Success, fame and wealth have not spoilt him and in spite of his great position he remains essentially human. It enables him to understand and sympathize with those who are lowly and his readiness to alleviate distress and his generosity are common knowledge.

There is an amusing trait of his to which I should refer—his absent-mindedness—for without it no picture of Sir Alladi would be complete. This quality I found sometimes very diverting. He would meet me and get absorbed in some lively talk and in the midst of it would get up all of a sudden without a single parting word and make straight for the portico. Such little peculiarities of his lent him ineffable charm. He is altogether an engaging personality and I like many others have been irresistibly drawn towards him.

There is no doubt that apart from his official position he is the most distinguished member of our bar. No one would gainsay that he is one of the most eminent Advocates-General we have had or for the matter of that, any part of India. Future generations would venerate him as an illustrious lawyer.

But who knows he may not enter upon a public career? He is still young enough for it and in that case he would bring to the service of the country (in any sphere, political, social or educational—it is a mistaken notion that politics should absorb every talented man's energies) his ponderous and penetrating intellect, his brilliant gifts, his forceful personality and his large-hearted catholicity and posterity will remember him then both as a great lawyer and a great patriot."

Mr. K. Bhashyam, the President of the Association, accepted the portrait on behalf of the Association and Mr. S. Panchapagesa Sastri, Secretary of the Association, proposed a vote of thanks to Sir M. Venkatasubba Rao and others.

Reference in Court to Sir Alladi Krishnaswami Aiyar.—His Lordship the Chief Justice paid a tribute to Sir Alladi Krishnaswami Aiyar, the retiring Advocate-General, on Friday, the 28th April, sitting specially for the purpose in special bench with Mockett and Krishnaswami Ayyangar, JJ. A large number of practitioners and the law officers of the Crown were present in the Court hall. The learned Chief Justice said:

"To-day is the last day of the present term and when the Court re-assembles on July 10, you will have vacated the office of Advocate-General of this Court which you have held with such great distinction for more than fifteen years. This Bench has been formed to express to you the thanks of the Court for the great and ungrudging assistance which you have rendered to it and to the administration of justice generally during your period of office. I have been looking through the list of Attorney-Generals of the Supreme Court and of the High Court of Madras and I find that only one occupant of the office has held it longer than you have. Mr. G. Norton was the Advocate-General of Madras from 1st March, 1833 to 10th March 1853. Although you do not hold the record for length of service in the office, but take the second place in this respect, I have no hesitation in saying that no incumbent can have held it with greater distinction.

"My learned brothers and I are grateful for the help which you have given to us. I, in particular, owe you a great debt of gratitude in this respect. When I came here as Chief Justice seven years ago I was not altogether unacquainted with the general principles of Hindu law but I had still a lot to learn about the Mitakshara law as administered in this Presidency, and I thank you most sincerely for the great assistance which you have given me. The special thanks of the Court are due to you for the help which you have given us in the numerous cases which have raised questions of constitutional law. Since the passing of the Government of India Act, 1935, very important constitutional questions have come up for decision and we have received very great help from you in deciding them.

"Your unflagging interest in the cause of higher education and your benefactions to public institutions are so universally known that it is not necessary to recapitulate them here. Suffice it to say that outside the Court as well as within it you have shown a noble and most generous public spirit. We are now concerned of course more particularly with thanking you for your services to the Court and this we do most sincerely. It is a source of gratification to myself and to my learned brothers that although in the coming term you will not appear before us as Advocate-General we shall still have the benefit of your great help in the administration of justice."

The learned Chief Justice concluded by wishing Sir Alladi all happiness, good health and prosperity and expressed the hope that for many years to come the Court would still have his assistance in unravelling the knotty problems which the law so frequently presented and in deciding where the truth lay.

Replying, Sir Alladi Krishnaswami Aiyar, said:—

"My Lord Chief Justice and My Lords,

I am deeply grateful to Your Lordship the Chief Justice for the extremely kind, and if I may say so, far too generous terms in which you referred to my work as Advocate-General. I own to the normal human weakness of being cheered up by the feeling that—when one is laying down his office—the duties one has been discharging in any sphere are appreciated by those most competent to judge. A good part of my tenure of office has coincided with Your Lordship's term as Chief Justice of this Court, and it is no small consolation to me that my work, such as it has been, should have elicited your Lordship's appreciation in such generous measure.

I have held this office for a much longer term than many others mainly because I was called to the office pretty early, and I loved my work at the Bar more than any other sphere of activity and usefulness that might have been open to me. My relations with the successive Chief Justices and other learned Judges have been uniformly cordial as they have been with successive Governments of different political complexion.

Though I may not be representing the Crown hereafter, as I hope to continue at the Bar for a few more years, I have no doubt that I shall be having opportunities as frequent as in the past of maintaining the same relationship with your Lordship the Chief Justice and other members of this Court as in the past, perhaps not infrequently playing a different role by championing the cause of the citizen as against the Crown.

Once again I thank Your Lordship for the very cordial terms in which Your Lordship has spoken of my work."

BOOK REVIEWS.

The Bombay Industrial Disputes Act by P. B. Patwari with P. D. Patwari, with a foreword by M. C. Setalwad, published by P. B. Patwari, 6, Pritamnagar, Ahmedabad, 1944, 191 pages. Price Rs. 8.

The maintenance of industrial peace is becoming a matter of increasing importance with the progressive industrialisation of the country. Conflicts between employers and employees over wages, working hours, employment of women and children, old age pensions, health and accident insurance schemes, right to strike, etc., are inevitable and frequently occur. Different methods of tackling these and similar difficulties have been tried in different countries. Experience has however shown that in such cases no method can yield more salutary or satisfactory results than conciliation and arbitration.

The Bombay Industrial Disputes Act is the first enactment of its kind in India, its aim being to bring about a settlement of industrial disputes by conciliation and arbitration. The text of the Act is set out with helpful and lucid commentaries under each section. In a series of appendices, the rules framed under the Act, the forms prescribed, the Standing Orders made and finally settled by the Industrial Court under section 26 (2) of the Act are made available. Thus all essential information indispensable alike to the employers as well as employees is to be found in the book. The book will be of great use to industrialists and workers, organisations of labour, legal practitioners and in fact to all concerned in the administration of justice. We heartily welcome the publication.

Case-Law under the Defence of India Act and Rules by K. Ramaswami Ayyangar, B.A., B.L., Advocate, Chittoor, 1944, 18 pages. Price Annas Eight.

In this booklet of 18 pages more than 70 decisions pronounced by the various Courts of law in matters arising under the Defence of India Act and Rules have been reviewed and the propositions emerging therefrom have been classified and presented as far as possible in the very language of the learned Judges. The brochure will greatly facilitate an understanding of the provisions of the Act and Rules by lawyers and laymen alike, and give them an accurate idea of their working. Being priced moderately the booklet will be within the easy reach of all.

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SIR JOHN BEAUMONT ON THE INDIAN JUDICIAL SYSTEM.

Sir John Beaumont, the Chief Justice of the Bombay High Court, retired in 1943. He has lost no time in offering his criticism of the Indian judicial system. The full report of his speech will in time appear in the Asiatic Review and will, We hope, be reproduced in the Press. But in the meanwhile, we cannot refrain from making our comments on his proposals. Sir John characterised the control of the executive over the magistracy as "thoroughly vicious". He has been reported as saying:

"I am afraid when the Congress party was in power, it was as anxious to control magistrates as its predecessors had been, and would have extended control to the judges if it had had the chance. At any rate whatever the reasons may have been, the Congress Governments made no real attempt to effect the reform and from the unanimity with which the Congress Governments abandoned the project, I think one may assume they acted on the orders of the Working Committee—that irresponsible and autocratic body working in the back-ground outside the constitution—whose activities played such a sinister part in destroying all semblance of real democratic government in the Provinces wherein the Congress party was in power. For much of the work of the Bombay Congress Government, I had sincere admiration and my relations with the ministers concerned with Law and Order were mostly friendly, but I regarded the failure to tackle the problem of the magistracy as a cynical sacrifice of principle to expediency".

We cannot be sure of the responsibility of any outside Congress agency for this failure of the Congress Governments to tackle this question. But we are aware that the Madras Premier expressed himself against the separation of the executive and the judiciary and wrote to the Premier of the Central Provinces warning him against accepting it in his Province. These are the words of his letter, quoted from "The Hitavada", Nagpur, of February 26, 1941.

"Though I have no time to write any decent letter to you, I must hurry to warn you against accepting policy of separating the executive from the judiciary which, due to old ideas, some of our party members still think is good politics. Dividing the executive from the judiciary will take away whatever limited power we have secured for the people. The judiciary will become the stronghold just as the executive was before (*sic*) foreign domination. I have turned it down in this Province and my party has understood and appreciated the reason. Apart from what is stated above, there will be conflicts if not deadlocks".

This journal has naught to do with politics. And whoever ultimately might have been responsible for this view of the Madras Premier, we think that the view was wholly wrong. The Congress has throughout its long history agitated for the separation of the executive from the judiciary, in that respect voicing the public opinion of the country as a whole. At all the Conferences of lawyers including the one recently held at Kumbakonam, the separation has been uniformly demanded. It is difficult to understand the claim that the power of the executive over the magistracy is a power obtained *for the*

people, or the statement that his party understood and appreciated the reason. If we refer to these matters in this connection it is not with a desire to raise any political controversy over it. It is only to point out that a reform so obviously necessary and so uniformly supported, and so wholly desirable in itself, has the insuperable difficulty of everyone for the time being in power insisting upon its rejection so long as he is in power. The Government of the day do not want it; the Congress Government in Madras did not want it and commended the same attitude to the Central Provinces. If the matter received attention as the result of Sir John's strong strictures on the present system he will have the credit of having achieved this much-needed reform in the Indian judicial administration.

Connected with this is the other recommendation of Sir John Beaumont that the recruiting for the judiciary should be in the hands of the High Court and not in the hands of the Public Services Commission. In the Lawyers' Conference at Kumbakonam the same recommendation was made. We are aware that even before the Government of India Act of 1935, there was no uniform system of recruitment. In Madras the recruitment was made by the High Court for the munsif's place. In Bombay the Government made the appointment of subordinate judges. The old Madras practice of the High Court recruiting for the subordinate judicial service is the most satisfactory arrangement and that should be restored.

A third matter that Sir John notices is the recruitment for the judiciary from the ranks of I.C.S. men. Sir John recommends its discontinuance. It *is* time that it was discontinued. At one time the barrister element on the High Court required to be helped in judicial administration by those who had previous knowledge of the country. It was then thought that a number of I.C.S. men should be appointed to the High Court. The rule that one-third of the judges of the High Court should be barristers and one-third should be I.C.S. men had its origin in this desire to combine knowledge of law with knowledge of Indian conditions for the due administration of justice. That rule has now been abolished very properly, because knowledge of Indian conditions is plentifully available among the members of the legal profession in India from whom recruitment can be and is being made. It is no longer necessary to appoint I.C.S. men for the object for which they were originally appointed to the High Courts. It is but right that the judicial administration should be in the hands of a judiciary composed of members trained in the legal profession. And I.C.S. men should be confined to the executive department of the government.

On these three matters Sir John is right in our opinion and his recommendations should be carried out at the earliest opportunity. The recruitment of the judiciary by the High Court may easily be restored. Recruitment of I.C.S. men to the judiciary and their appointment to the High Court Bench may well cease for the future. The separation of the judiciary from the executive may perhaps have to wait till after the war.

On one matter we do not agree with Sir John. We do not think that the Federal Court was established prematurely. The legislative power having been distributed between the Provincial and Federal legislatures, a Federal Court was necessary to keep them within the limits of their legislative power. To leave it to the High Court and to the Judicial Committee without a Federal Court to deal with these constitutional questions is at the least unusual. We agree however that the Federal Court should be constituted the Supreme Court for India dealing finally and exclusively with all appeals from the High Courts in India. The only objection that was recently taken was to the option given to the parties in the matter of appeals, to choose between the Federal Court and the Privy Council.

T. R. V. Sastri

A NOTE ON SECTION 44-B OF THE MADRAS HINDU RELIGIOUS ENDOWMENTS ACT

BY

B. Varadarajulu Chettiar, B.A., B.L., Official Receiver, Coimbatore.

Section 44-B which was inserted by Act XI of 1934 has given rise to much litigation. To appreciate the real difficulty it is necessary to examine the provisions of the newly added section which runs:—

"44-B. (1) Any exchange, gift, sale or mortgage and lease for a term exceeding five years of the whole or any portion of any inam granted for the performance of a charity or service connected with a math or temple shall be null and void."

The words "inam granted for the performance of a charity or service connected with a Math or Temple" as well as the last portion dealing with the consequence, *viz.*, "shall be null and void" should be noted.

On a first reading of the section one is faced with questions, such as, whether it has got retrospective effect; whether it can take away rights already accrued under the enactments, say, for instance, the Indian Limitation Act, etc.

There is nothing in the Act itself to solve the question whether the section is retrospective in character. One has therefore to turn to the principles governing the interpretation of statutes. It is a well established principle of law that any new amendment cannot have a retrospective effect so as to take away vested interests or rights which have already accrued under the existing law unless the same has been specifically so declared. Any statute which takes away or impairs vested rights acquired under existing laws, creates new obligations, imposes new duties or attaches new disabilities, must be presumed (out of respect for the legislature) not to have retrospective operation. No doubt there are exceptions like declaratory statutes passed to remedy defects in form. But an amending act is more than a declaratory statute and cannot be taken to be retrospective in character.

On a reading of the section, one is led to think that it affects only future alienations. No doubt it is likely to be contended that the intention of the legislature in introducing the section is to protect the temple properties from alienations already made, and if it is held to apply only to future transfers the very object of the Act will be defeated. Whatever be the intention of the legislature it is the duty of the Court to administer the law as it stands according to the plain words and it is for the legislature to rectify the defect by suitable amendments to give effect to the real object or intention. In this connection the amendment to section 3 of the Transfer of Property Act by Act X of 1927, dealing with "attestation" may well serve as a pointer. There the intention of the legislature was to give a retrospective character to the Amending Act and so the words "and shall be deemed always to have meant" were introduced. Such words being absent in the section under discussion it cannot safely be contended that it is intended to be retrospective. Under the law as it existed prior to the amendment, if a provision had been made for the due performance of charity or service by reserving the *tharam* or *thirva* when transfers were made of the inam property, it was deemed to be not an alienation to be questioned. Board's Standing Order No. 54 is in point. However, one finds that various transfers, even if provisions are made for the performance of charity or service, are being nullified by proceedings before the Revenue authorities by applications under section 44-B and the transferees, even when they are *bona fide*, are left without remedy. As has already been suggested if one takes the section as having a retrospective effect it is likely to create

complications in respect of rights accrued under the Indian Limitation Act, which being a piece of Central Legislation, cannot be infringed by the Act of a Provincial Legislature.

There is a more important question namely to what class or classes of inams does the amendment apply. There are various classes including grants in which the deity is the grantee, or the archaka doing service to the temple, and grants for other services. In construing the nature and class of grants difficulties have arisen and decisions of Courts are not uniform. A recent decision of our High Court (not reported) of Leach, C.J., and Lakshmana Rao, J., in A.S. No. 198 of 1940, *Kothukara Chennimalai and others* v. *Lakshmideviammal,* has laid down that section 44-B is applicable only to service inams and not to devadayam inams or grants in favour of the deity since deities are not under service to any one. At the same time their Lordships clearly emphasise that the rights of the trustees of the temple to question the unauthorised alienations in the ordinary Civil Courts is not in any way affected by the proceedings before the Revenue authorities. The effect of the decision is that the section is inapplicable to grants in favour of deities and consequently the Collector has no jurisdiction under section 44-B to resume the inam from the alienee.

Again to find out whether a particular grant is in favour of a deity or archaka is not free from difficulty. A reference to the decisions in *Swamy Iyengar and others* v. *Venkataramana Iyengar and another*[1] and *The President of Commissioners for the Hindu Religious Endowments, Madras and others* v. *Thadikonda Koteeswara Rao and others*[2] may be made. What then is the remedy of an alienee of an inam, even assuming that the grant is in favour of the deity when the Revenue authorities have resumed the grant under section 44-B? The Act provides that the order of the Collector is final subject to the result of any suit instituted in the Civil Court for determining whether the inam comprises both melvaram and kudivaram or only the melvaram. Excepting this, an order of resumption shall not be liable to be questioned in any Court or otherwise. The remedy always lies under the general law. Whether the objection is to the jurisdiction or goes to the root of the matter, an action will certainly lie in a Civil Court. Any statutory body getting power under statutory authority exceeding the authority given by the statute can be questioned in the Civil Courts since such action is *ultra vires.*

The High Court, in a recent case, S. A. No. 1401 of 1941, *Kandasamy Pillay* v. *Muthukomarandy,* has held that the act of resumption was done on behalf of the Government and the Government must be made a party to the suit and that in the absence of the Government the resumption cannot be set aside.

Thus the amendment has given rise to various doubts and difficulties and it is time that legislature intervenes and makes the position clear.

SUMMARY OF ENGLISH CASES.

RICHES *v.* WESTMINSTER BANK, LTD., (1943) 2 All E.R. 725 (C.A.).

Practice—Interest not included in the statement of claim—Discretion of Court under section 3, Law Reforms (Miscellaneous Provisions) Act, 1934, to award interest.

A Judge has under section 3 of the Law Reforms (Miscellaneous Provisions) Act, 1934 an unfettered discretion to award interest even where no claim for interest has been made

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2. (1937) 2 M.L.J. 413.

1. A.I.R. 1934. Mad. 381.

in the pleading. Though it is not necessary it may be advantageous that the point should be raised in the statement of the claim.

WESTERN SCOTTISH MOTOR TRACTION CO., LTD. v. FERNE OR ALLAM AND OTHERS, (1943) 2 All E.R. 742 (H.L.).

Torts—Negligence—Omnibus driver—Driving round curve at excessive speed—Injury to standing passenger who had nothing to hold on causing death—Liability.

Where an omnibus was not provided with rails or straps for the purpose of enabling all standing passengers to steady themselves against a sudden sway and a standing passenger was fatally injured by reason of the omnibus being driven at an excessive speed around a curve, the driver cannot escape liability by saying that he was driving at a speed which was safe for passengers who were seated inside the bus or though standing were holding to some portion of the vehicle to steady themselves.

SUMMERS v. ROBERTS, (1943) 2 All E.R. 757 (K.B.D.).

Pharmacy Act (1941), section 12 (2)—Prohibition of sale of medicines "otherwise than in a shop"—Shop—Meaning—Temporary stall in market—If "shop" or not.

The appellant sold by retail at a stall—a plank or board placed upon two trestles—situate in the uncovered portion of the Leeds City Market some medicine. Under the Pharmacy Act, 1941, section 12 (2) it was an offence to sell by retail an article of the sort sold in this case unless the sale was effected at a shop. On a special case, *Held*: The words "premises where a retail trade is carried on" are not wide enough to make a place in no way limited or bounded by any ascertainable marks or fences, with no structure upon it except two trestles and a board, with no continuity or regularity except that business took place twice a week, a "shop" for the purposes of the Pharmacy Act.

HENDERSON v. HENDERSON, (1944) 1 All E.R. 44 (H.L.)

Husband and wife—Adultery committed by wife—Husband renewing co-habitation on promise by wife to be of good behaviour in future—Conclusiveness of condonation—Subsequent withdrawal of such promise by wife—Effect.

In a husband's petition for divorce it was found that after the wife had admitted to the husband her adultery, the husband told her that she must entirely break off all acquaintance with the co-respondent if the husband were to remain with her, and that she promised to do so. Thereupon the husband and wife went to bed together; he forgave his wife and had sexual relations with her that night at her suggestion. Early the next morning her attitude changed and she said she did not see why she should stop seeing the co-respondent, and that, if she denied the adultery, the co-respondent ought to do so too. Upon this the husband left the house and never lived with her again. On a question whether there was a condonation which will bar the husband's petition,

Held: There cannot be such a thing as contingent condonation by a husband of his wife's adultery—certainly not when the condonation includes the irrevocable act of sexual intercourse. Condonation cannot be treated as cancelled because an erring wife who makes promises as to her future conduct withdraws the promise later on. Condonation is not a contract in which one party may claim to be discharged by the other's repudiation. Condonation is the overlooking of past wrongs accompanied by action on the part of the aggrieved spouse which shows that they are really forgiven, and the circumstance that the guilty party, before or at the time of condonation, makes promises as to future conduct cannot lead to the consequence that previous offences are no longer condoned, if and when the promises are afterwards repudiated. The result might be different if it could be shown that the husband's forgiveness and taking back of his wife was procured by the wife deliberately misrepresenting her true state of mind. It is fraudulent misstatement of fact (as to the wife's state of mind), not assurances as to future conduct, which may remove the disabling consequences of condonation.

CADZOW COAL CO. LTD. v. PRICE, (1944) 1 All E.R. 54 (H.L.).

Workmen's Compensation—Accident arising out of employment—Burden and quantum of proof.

It is sufficient discharge of the workman's onus of proving that the accident arose out of his employment, if he shows that an accident of such a character as that which in fact occurred was one to which his occupation was specially exposed. He is not required to explain the cause of the accident and to show that he was not guilty of any serious and wilful misconduct.

Re PASCOE, (1914) 1 All E.R. 70 (Ch.D.).

Bankruptcy Act (1914), *section* 39—*Successive bankruptcies—After acquired property —Vests in trustee of first bankruptcy.*

P was adjudicated bankrupt on August 26, 1926, the Official Receiver being the trustee in bankruptcy. A dividend of 2*sh.* in the £ had been paid by December 22, 1933. No further dividend was paid and *P* never obtained his discharge. *P* subsequently went into business on his own account and by some means he had acquired a certain amount of cash by the month of March, 1942. In that month enquiries were started regarding his dealings with a company and he was ultimately arrested and on April 15, 1942, *B* to whom *P* had handed a sum of £2,000 to be held for *P*, came to know that *P* was an undischarged insolvent and handed over the money to the police inspector intimating the position. In the summer of 1942, £400 was paid out of this money to *P's* solicitors for the costs of the defence, with the leave of the judge. *P* was convicted and the judge ordered the balance of amount to be paid towards the costs of the prosecution which was accordingly paid to the county council. Meantime the Official Receiver wrote to the chief constable of the county council demanding the amount as after-acquired property of the bankrupt but inspite of the notice the amount was paid over to the county council. On November 12, 1942, the county council presented a bankruptcy petition against *P*; a receiving order was made on December 16, 1942, and on December 18, 1942, he was adjudicated bankrupt for the second time. On January 6, 1943, *D* was appointed trustee in the second bankruptcy. *D* applied to the bankruptcy Court and claimed the amount which had been paid for costs of prosecution.

Held, that the title to the amount vested in the first trustee in bankruptcy when *P* acquired it and the passing of the money from *P* to *B* and from *B* to the police could not operate as a divesting.

JOTTINGS.

Amendments to the Madras Bar Council Rules.—With the previous sanction of the High Court of Judicature at Madras, the Bar Council has made the following amendments to the Madras Bar Council Rules framed under sections 9 and 15 of the Indian Bar Councils Act, 1926:—

(1) Substitute the following for the first paragraph of rule 28:—

"No advocate shall be a promoter of a trading company, nor shall he without the leave of the Bar Council otherwise engage in any trade or calling."

(2) Substitute the following for the existing rules 30 and 31:—

"30. Where monies are received from or on account of a client, the entries in the accounts shall contain a reference as to whether the amounts have been received for fees or out-fees and during the course of the proceedings, no advocate shall, except with the consent in writing of the client concerned, be at liberty to divert any portion of the out-fees towards fees.

31. (i) Where any amount is received from Court or from other parties on behalf of the client, the fact of such receipt must be intimated to the client as early as possible.

(ii) (*a*) After the termination of the proceeding the advocate shall be at liberty to appropriate towards the settled fee due to him, any sum remaining unexpended out of the amounts paid or sent to him for out-fees or any amount that has come into his hands in that proceeding.

(*b*) Where the fee has been left unsettled, the advocate shall be entitled to deduct, out of any monies of the client remaining in his hands at the termination of the proceeding for which he had been engaged, the fee payable under the rules in force for the time being. The balance, if any, shall be refunded to the client.

(*c*) The advocate is under no obligation to appear for the client if the whole of the settled fee is not paid to him before the hearing of the case, provided that reasonable notice is given to the client that he will not appear for him unless his full fee is paid".—*Fort St. George Gazette, dated 9th May,* 1944. *Judicial Notifications.*

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NOTES OF INDIAN CASES.

Debi Prasad Sharma *v.* Emperor, (1943) 2 M.L.J. 568 (P.C.).

From the point of view of the liberty of the press, the decision of the Judicial Committee in the above case constitutes a notable pronouncement. The matter came before the Board on appeal from the judgment in *Emperor* v. *Debi Prasad Sharma*[1], where the printer, publisher and editor of a daily newspaper were charged in contempt proceedings by the Allahabad High Court, for having published a news item and comment thereon untruly alleging that the Chief Justice had written to the subordinate judicial officers enjoining them to collect money for the War Fund, and were found guilty and convicted for the same. The learned Judges who heard the rule held that the publication " is a clear contempt of Court and it is unnecessary to quote authority." In reversing the decision of the High Court, the Privy Council points out that on the facts found " there is no criticism of any judicial act of the Chief Justice, or any imputation on him for anything done or omitted to be done by him in the administration of justice." It was further observed : " It can hardly be said that there is any criticism of him in his administrative capacity, for. . . . the administrative control of the subordinate Courts of the province. . . . is exercised not by the Chief Justice but by the Court over which he presides." In effect the criticism was of something alleged to have been done by the Chief Justice outside his judicial proceedings. In the circumstances, according to the Privy Council " a simple denial in public of the alleged request would at once have allayed the trouble"; and " if a Judge is defamed in such a way as not to affect the administration of justice he has the ordinary remedies for defamation if he should feel impelled to use them." Their Lordships therefore held that " the proceedings in contempt were misconceived." Incidentally their Lordships point out that though it will be galling for any judicial personage to be criticised publicly as having done something outside his judicial proceedings which was ill-advised or indiscreet, "judicial personages can afford not to be too sensitive." In view of these remarks it may be useful to examine the law as established in regard to this matter.

Jurisdiction in contempt is special and extraordinary. Every court of record has such jurisdiction. The Court deals with it *brevi manu.* Contempt of Court may be of three types, according to Lord Hardwicke. They are : (1) contempt by scandalising the Court itself; (2) contempt of Court in abusing parties who are concerned in causes there ; and (3) contempt of the Court in prejudicing mankind against persons before the cause is heard, In re *Read and Huggenson*[2]. In *Reg.* v. *Gray*[3], Lord Russell of Killowen, L.C.J., has stated that contempt by scandalising a Court or a Judge occurs when any act is done or writing is published to bring a

1. (1942) O.W.N. 6 : 1942 All.Cr.C. 28. 2. (1742) 2 Atk. 469 : 26 E.R. 683.
3. (1900) 2 Q.B. 36.

Court or a Judge of the Court into contempt or to lower his authority. In *In the Reference from the Bahama Islands*[1], the test applied was whether the words complained of were calculated to obstruct or interfere with the due administration of the law or the course of justice. So anything said or written about a Judge not as a Court but as an individual, not concerning the administration of law but outside it, not interfering with the course of justice but merely criticising him in regard to alleged acts outside his judicial duties may not constitute contempt by way of scandalising the Court.

The basis of the power to punish for contempt and the limitation subject to which the power should be exercised are indicated by Lord Morris in delivering the judgment of the Judicial Committee in *McLeod* v. *St. Aubyn*[2], where he observed : " The power summarily to commit for contempt of Court is considered necessary for the proper administration of justice. *It is not to be used for the vindication of the Judge as a person. He must resort to action for libel or criminal information* (italics ours). Committal for contempt of Court is a weapon to be used sparingly and always with reference to the administration of justice." The antithesis is thus between vindication of the judge as a person and vindication of the judge with reference to the administration of justice. The point is carried further by Lord Russell of Killowen L.C.J., in *Reg.* v. *Gray*[3], where he remarked: "Judges and Courts are alike open to criticism and if reasonable argument or expostulation is offered against any judicial act as contrary to law or public good no Court could or would treat that as contempt of Court." In *Ambard* v. *Attorney-General for Trinidad and Tobago*[4], in memorable words, Lord Atkin laid down : " But whether the authority and position of an individual judge, or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way : the wrong headed are permitted to err therein : provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue : she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men." The observations of Lord Russell of Killowen, L.C.J., and Lord Atkin show that even where criticisms are made of the " public act done in the seat of justice," the critic is immune provided the criticism is " genuine," in "good faith" and does not attribute "improper motives" to the judicial personage criticised. In other words there should be an absence of " malice " about the criticism. In the instant decision, according to the Privy Council, the criticism was not only not about the Court or the administration of justice but the learned Judges of the High Court had found that the accused were not animated by malice.

Incidentally another matter might be adverted to. In *McLeod* v. *St. Aubyn*[2], it was stated that even in regard to contempt by way of scandalising the Court, contempt proceedings had become obsolete in England, a reservation being however made as regards " small colonies with coloured populations." Lord Morris stated : " Committals for contempt of Court by scandalising the Court itself have become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them. But it must be considered that in small colonies consisting principally of coloured populations the enforcement in proper cases of committals for contempt of Court for attacks on the Court may be absolutely necessary to preserve in such a community the dignity of and respect for the Court." It may respectfully be urged that a more appropriate test will be the "local conditions" instead of the colour of the people. Anyway, that contempt proceedings have not become obsolete even in England is clear from *Reg.* v. *Gray*[3], as observed by Lord Atkin in the case under review.

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1. (1893) A.C. 138.
2. (1899) A.C. 549 (P.C.).
3. (1900) 2 Q.B. 36.
4. (1936) A.C. 322.

ANANT *v.* SHANKAR, (1943) 2 M.L.J. 599 (P.C.).

This is a decision of considerable importance, in the law of adoption. It elucidates the scope of the ruling in *Amarendra Man Singh* v. *Sanatan Singh*[1]. That case had given a re-orientation as regards the limits of a widow's power of adoption. The power will cease only if her husband had left a son and that son himself had died leaving behind him his own widow or son to continue the line. The power had nothing to do with the question of vesting or divesting of the estate, *Vijaysinghji Chatrasinghji* v. *Shivsangji*[2]. The decision under notice has re-affirmed and applied these principles.

The ruling is however to be noted for more than one point. It lays down that if an adoption is valid it cannot be refused effect. It repudiates the theory that though an adoption as such may be valid it cannot divest any estate of inheritance unless the estate was then vested in the adopting widow as heir either to her husband or a deceased son—a theory, which had been upheld by a Full Bench of the Bombay High Court in *Balu Sakharam* v. *Lahoo*[3]. It rejects the proposition that the existence of a coparcenary at the date of the adoption into which the adopted son could be admitted is essential if he is to share in the family property. The view of Beaumont, C.J., in *Balu Sakharam's case* with which Wadia, J., had agreed that the rulings in *Amarendra's case* and *Vijaysinghji's case*, were to be explained on the footing that in those cases a coparcenary was subsisting is stated to be unacceptable as according to their Lordships those two were really cases where property had passed to a collateral by *inheritance* from the last male-holder. Incidentally their Lordships seem to reject the view of Rangnekar, J., on p. 572 of *Balu Sakharam's case*[3], that the widow's power to adopt can be defeated by a partition between coparceners, a view which according to their Lordships "has since been negatived by two High Courts on very cogent reasoning, *Bajirao* v. *Ramakrishna*[4], *Sankaralingam Pillai* v. *Veluchami Pillai*[5]."

One point in the decision under notice is bound to arrest attention. The Privy Council holds that on adoption by the mother of the last male-holder it is not merely the property taken by him from his own father but also the properties which he had inherited from other persons, which all on his death had vested in a collateral as heir to him, that would be divested. It has no doubt been considered to be settled law—see *Pattu Achi* v. *Rajgopal Pillai*[6]—that an adoption by a widow after the death of her son would divest her of the property she had taken as his heir. The statement may be held to cover a case where the son had inherited the property from one other than his father. The anomalous results which the rule may entail have been referred to in (1941) 2 M.L.J. 25 (N.I.C.). The present decision constitutes a confirmation of that interpretation. It also goes a step further and extends the rule to a case where the property of the last male-holder had passed to a person other than the mother of the deceased. The scope of *Bhoobun Moyee's case*[7], as understood in *Faisuddin Khan* v. *Tincowri Saka*[8], that no adopted son could claim as preferential heir the estate of any person other than his adoptive father if such estate had vested before adoption in some heir other than the adoptive widow and the view of Telang, J., in *Chandra* v. *Gojorbai*[9] that adoption by a widow does not divest the estate of one on whom the inheritance has devolved from a lineal heir of the husband are held to be untenable after the decision in *Amarendra's case.* At the same time it is stated that "neither the present case nor *Amarendra's case* brings into question the rule of law considered in *Bhubaneswari Debi* v. *Nilkomal*[10], that "according to the law. . . . an adoption after the death of a collateral does not entitle the adopted son to come in as heir of the collateral." Thus in the result it would seem (1) that the adopted son can always divest the interest of his

1. (1935) 65 M.L.J. 203 : L.R. 60 I.A. 242 : I.L.R. 12 Pat. 642 (P.C.).
2. (1936) 68 M.L.J. 701 : L.R. 62 I.A. 161 : I.L.R. 59 Bom. 360 (P.C.).
3. I.L.R. (1937) Bom. 508 (F.B.),
4. I.L.R. (1941) Nag. 707.
5. (1942) 2 M.L.J. 678 (F.B.).
6. (1941) 2 M.L.J. 134.
7. (1862) 10 M.I.A. 279 (P.C.).
8. (1895) I.L.R. 22 Cal. 565, 571.
9. (1890) I.L.R. 14 Bom. 463, 469.
10. (1885) L.R. 12 I.A. 137, 141 : I.L.R. 12 Cal. 18 (P.C.).

father which had on his death vested in any person either by survivorship or by inheritance; (2) that if the adoption is made after the death of a collateral of the husband the adopted son cannot claim the properties of the collateral as his preferential heir from the person to whom it had passed by heirship; but (3) where the adoption is made by the mother of the last male holder after his death the adopted son can divest from the person in whom it had vested, be it the adoptive mother or a third person, not merely the property which had come to the last male-holder from his own father but also property which had come to him from other persons or sources.

DACCA MUNICIPALITY *v.* KRISHNA LAL PAL, I.L.R. (1943) 1 Cal. 1.

An interesting question concerning encroachments on municipal roads and the liability of the municipality to pay compensation, where the encroachment directed to be removed had been enjoyed for over the period of prescription *after* the constitution of the municipality, fell to be considered in this case. Section 241 (1) of the Bengal Municipal Act corresponds roughly to sections 180, 181 and 182 (1) of the Madras District Municipalities Act; likewise section 241 (3) corresponds to section 182 (2). Under the Bengal Act, provision is made for the payment of compensation "if any structure or fixture was constructed over a land *before* it became a public street and the right to have such a fixture had been acquired by prescription." The Act does not provide for payment of compensation to an owner who by prescription *after* the constitution of the municipality has acquired a title to the fixture. In the Madras Act no distinction is made between a construction prior to the constitution of the municipality and one subsequent thereto. If a title by prescription has been acquired, then on eviction the owner will be entitled to compensation, if he suffers damage thereby, *Rathnaswami Nadar* v. *Virudunagar Municipal Council*[1]. In the case under review the learned Judges remark: "If any structure or fixture was constructed over a land before it became a public street . . . obviously the erection of the structure or fixture was not a public nuisance at the time when it was erected and consequently the owner or occupier is entitled to get damages. If the structure or fixture was erected over the land after it became a part of the public street it would become a public nuisance and by prescription such nuisance cannot be legalised." If this be the *raison d'etre* underlying the award of compensation then the provision in the Madras Act drawing no distinction between prescriptive title acquired before the constitution of the municipality and one acquired subsequent thereto in the case of encroachments seems to ignore it. The true principle however seems to be, not whether the encroachment in question was a public nuisance or not but, whether open and adverse enjoyment for a certain number of years where it did not originate in an offence should be denied effect.

BAIKUNTANATH HALDAR *v.* KISHORI MOHAN BANERJI, I.L.R. (1943) 1 Cal. 5.

The effect of a vesting order under section 37 of the Provincial Insolvency Act has been the subject of several decisions and of conflicting judicial opinions. According to one view, as annulment puts an end to the insolvency proceedings, the appointee under section 37 is a mere custodian of the properties of the ex-insolvent; the creditors are left to their ordinary remedies and the appointee is to hold the properties subject to any order of attachment and sale he might receive from any Court; he may take steps to preserve the assets but he has no right to admit proof of debts, distribute dividends, or do any act of administration of a nature which a receiver in insolvency can do. The leading expositors of this view are the rulings in In re *Anamale Chettyar* v. *R. K. Banerji*[2], following *Jaing Bir Singh* v. *The Official Receiver*[3] and *Panna Lal* v. *Official Receiver*[4]. The other view is that the appointee

1. (1943) 1 M.L.J. 406.
2. (1936) I.L.R. 14 Rang. 254 (F.B.).
3. (1933) I.L.R. 11 Rang. 287 (F.B.).
4. (1930) I.L.R. 53 All. 313.

under section 37 can under the directions of the Court realise the assets of the debtor and distribute them among the creditors much in the same way as is provided in the Insolvency Act. The leading authority expounding this view is *Veerayya* v. *Srinivasa Rao*[1] followed in decisions of the Patna, Calcutta and Lahore High Courts. All the decisions are agreed : (1) Section 43 is introduced for the first time by the Insolvency Act of 1920 ; (2) It has no analogue in the English Bankruptcy law ; (3) Its object is the punishment of the insolvent and not the conferment of any advantage on him ; and (4) Where the Act provides that the property of an insolvent shall vest in the Court or in a receiver it also usually adds that "it shall become divisible among the creditors," but that such a provision is absent in section 37 (1). It is also accepted—as pointed out by Bankes, L.J., in *Flower* v. *Mayor of Lyme Regis*[2] —that the effect of an order of annulment is to set aside the order under which the trustee or official receiver obtained his title to the debtor's property. It is further generally agreed that an order vesting property in the receiver under section 37 does not give him all the powers which he as a receiver in insolvency had. In *Panna Lal* v. *Official Reeciver*[3], *Jaing Bir Singh* v. *The Official Receiver*[4], In re *Anamale Chettyar* v. *R. K. Banerji*[5] and *Suleman* v. *Laxman*[6], it has been held that if there was an annulment, the insolvency ceases to exist and the Court becomes *functus officio* and if instead of returning the property to the insolvent it vests the same in an appointee it is only to put a "brake" upon the ex-insolvent's activities and make the properties available to creditors to proceed through a Civil Court. It is also recognised by these decisions that if in the case of an annulment following on a composition the Court still retains jurisdiction in insolvency it is due to the specific provisions in the Act to that effect. Notwithstanding these reasons there are a considerable number of decisions which have considered that "there are strong arguments of equity, necessity, commonsense as well as of law compelling the adoption of a different construction on the effect of vesting property in an appointee on an annulment under section 43, see *Jethaji Peraji Firm* v. *Krishnayya*[7], *Veerayya* v. *Srinivasa Rao*[1], *Official Receiver, Guntur* v. *Secretary of State for India*[8], *Venkatasubbiah* v. *Venkatasubbiah*[9], *Chennabasappa* v. *Official Receiver*[10]. *Venkatrayudu* v. *Narasimham*[11], *Nizam Khan* v. *Hukum Chand*[12], *Chouthmal Bhagirath* v. *Jokhiram Surajmal*[13], In re *Keshablal Dhar*[14], *Abdul Latiff* v. *J.R.Percival*[15]. What are these reasons of "equity, necessity, commonsense and law"? They are : *firstly*, though when the provisions of section 37 were originally enacted in the Insolvency Act, 1907, there was no such thing as annulment for default, still it being conceded that section 37 is modelled on English law and continues unaltered in spite of the provision for annulment on default being introduced, the control by Court contemplated by the original section 37 enabling the Court to distribute the estate through an appointee continues : *secondly*, the term "vest" in ordinary parlance when applied to the subject-matter of property gives the property in it and not merely control over it, *Coverdale* v. *Charlton*[16] : *thirdly*, to hold that after the order vesting the debtor's property in an appointee, the Court becomes *functus officio* would be to frustrate the very object for which the adjudication was annulled, namely, to bring home to the insolvent the consequences of his negligence and irresponsibility : *fourthly*, there will be no sense in vesting the properties in a third person, if he is to hold it for the benefit of the debtor : *fifthly*, if annulment is by way of punishing the debtor it is difficult to see why the creditors should be made to suffer ; for it is clear that if the creditors are left to their ordinary remedies at law there will not be any fair and equitable distribution amongst them and those that have got no decrees would be hopelessly handicapped as against those who may immediately proceed to execution and those who are aware of the annulment

1. (1934) 69 M.L.J. 364 : I.L.R. 58 Mad. 908 (F.B.).
2. (1921) 1 K.B. 488 (C.A.).
3. (1930) I.L.R. 53 All. 313.
4. (1933) I.L.R. 11 Rang. 287 (F.B.).
5. (1936) I.L.R. 14 Rang. 254 (F.B.).
6. A.I.R. 1938 Nag. 312.
7. (1929) 57 M.L.J. 116: I.L.R. 52 Mad. 648.
8. (1935) 69 M.L.J. 856: I.L.R. 58 Mad. 1014.
9. (1942) 1 M.L.J. 311.
10. (1943) 1 M.L.J. 127.
11. (1943) 2 M.L.J. 655.
12. (1941) I.L.R. 23 Lah. 330.
13. (1932) I.L.R. 12 Pat. 163.
14. (1932) I.L.R. 60 Cal. 259.
15. I.L.R. (1937) 1 Cal. 264.
16. 42 Q.B.D. 120.

will have an advantage over those who are not: *sixthly*, the vesting under section 37 in an appointee is not for any specified period and no conditions can be imposed upon him, though a reverter to the debtor can be coupled with conditions, thereby, indicating that an appointee is to hold till the estate is completely administered which means "that the general principles relating to distribution embodied in the insolvency law, being principles of justice and equity can certainly be applied." The considerations set out are weighty. Annulment under section 43 cannot "put the clock back" as if the adjudication had never been. To treat the appointee under section 37 as a "benevolent volunteer approved by the Court" does not seem to be proper. The view in the case under review that the appointee will have the power to realise the assets and distribute them is in consonance with the opinion favoured by most of the High Courts. Yet, having regard to the importance of the question, the sharp cleavage of opinion concerning it, and the frequency with which the point crops up, it is eminently desirable that the position should be set at rest finally either by a pronouncement of the Judicial Committee or by legislation.

BHUPAL CHANDRA SARKAR *v.* JAHAD BHUSAN SARKAR, I.L.R. (1943) 1 Cal. 56.

Under section 53-A of the Transfer of Property Act, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and the persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession. The shield thus afforded to the transferee is available only as against the transferor or any person claiming under him, but is ineffective against third parties with independent rights, see *S.N.Banerji* v. *Kuchwar Limestone Company, Ltd.*[1], *Hindusingh* v. *Khetsingh*[2]. Can a person taking as heir to the last full owner on the termination of a limited estate be regarded as a person claiming through the limited owner with reference to the defence set up under section 53-A by the transferee from a Hindu widow for a "legal necessity" of property of the value of more than Rs. 100? Henderson, J., in the case under notice answered the question in the negative, (see *Jagad Bhusan Sircar* v. *Panna Lal Chandra*[3]) and on appeal that view was confirmed. In *Katama Nachiar* v. *Raja of Shivaganga*,[4] the Privy Council observed in connection with a Hindu widow's estate that "the whole estate would for the time be vested in her absolutely for certain purposes though in some respects for a qualified interest." Drawing support from this observation, in *Balaram* v. *Kewalram*[5], Niyogi, J., has remarked: "If her acts bind the property they must bind the reversioner in the same manner and to the same extent as the acts of any absolute owner would bind his heir. The reversioner may not be her heir but is certainly her successor. To the extent that the reversioner is bound, he becomes a person claiming under her. Therefore it is open to the purchaser to pray in aid the equity doctrine of part performance (under section 53-A) to make good any formal defect in the widow's transfer in so far as it is binding on herself." However equitable this construction may be, it does not seem to be justified by the language of section 53-A. A person is said to claim "under" another when he derives his title through the latter. Niyogi, J., in the passage cited concedes that the reversioner is certainly not the widow's heir. *Ergo* his title is derived through her husband only, a different thing altogether. The fact that the transfer was supported by legal necessity will be relevant only in so far as it enables a limited owner to pass an absolute title to the alienee. It cannot however be invoked for supplying a want of capacity or for curing the absence of a necessary formality in regard to the transaction. In *Sri Gajapathi Radhamani* v. *Maharani Sri Pusapati Alakajeswari*[6], in connection with a mortgage by one of two co-widows, Sir Richard Couch observed that "even if there was a sufficient necessity, that necessity would not render a mortgage by one widow without the concurrence of the other binding upon the joint estate which had descended to the co-widows from their husband so as to affect the interest of the surviving co-widow after the

1. A.I.R. 1941 P.C. 128.
2. (1938) N.L.J. 123.
3. A.I.R. 1941 Cal. 287.
4. (1861) 9 M.I.A. 543, 604 (P.C.).
5. A.I.R. 1940 Nag. 396.
6. (1892) L.R. 19 I.A. 184; I.L.R. 16 Mad. 1 (P.C.).

death of the mortgagor." If the existence of a binding necessity would not be material and could not supply the lacuna caused by the absence of the concurrence of the other co-widow how can it, in a case where the formalities required by law in respect of a sale of property of the value exceeding hundred rupees have not been complied with, cure the defect so as to render the transaction valid? The reasoning of Niyogi, J., founded on the existence of legal necessity thus fails and on his concession that the reversioner is not the widow's heir he is not a person claiming under the transferor and therefore wil not be affected by the plea of part performance. The view to that effect in the instant decision is thus more acceptable than the opinion expressed in the Nagpur case.

Province of Bengal *v.* Ram Chandra Bhotica, I.L.R. (1943) 1 Cal. 69.

A point under the Land Acquisition Act on which a later pronouncement of the Madras High Court seems to have taken a different view came up for consideration in the above case. According to the Calcutta High Court, on a reference to the Court under section 18, on an objection to the amount of compensation awarded, the claimant cannot before the Court be permitted to amend his application for increasing his claim to compensation; nor can the Court award a sum in excess of the original sum claimed as a fair compensation. In the case in question compensation for trees had been claimed at Rs. 2,800 originally. The award gave Rs. 400. In the application to the Collector asking for a reference to the Court under section 18 the claimant stated that he should be paid Rs. 1,500. After the matter came before the Court the claimant was allowed to amend his application and to claim compensation to the extent of Rs. 10,000. The amendment was held by the High Court to have been wrongly allowed and was set aside. In *Zemindar of Ettayapuram*, In re[1], the facts were almost similar. The original claim was for compensation at 12 annas per square foot. At the time of asking for the reference the claimant asked for compensation at 8 annas per square foot. After the reference to the Court he wanted to claim at 12 annas per square foot and preferred an application to amend his claim. It was held by Byers, J., that "all that the claimant had to do was to state in his application (for reference to the Court) that he objected to the amount of compensation awarded and it was not incumbent upon him to state whether he claimed compensation at the rate of 12 annas as originally demanded by him or whether he limited it to some lesser extent; that the maximum and minimum which can be awarded by the Subordinate Judge are clearly indicated in section 25 (1) o the Act," and. . . . "the Subordinate Judge is not limited in framing his award to any figures mentioned by the petitioner in his application" and the amendment was therefore unnecessary. In the case under notice, however, Edgley and Biswas, JJ., have held that on a reference the only matter which comes before the Court for its determination is whether compensation is to be at the figure specified in the award or at the figure claimed in the application for reference. In *Pramatha Nath Mullick* v. *Secretary of State for India in Council*[2], Sir George Lowndes laid down that the jurisdiction of a Court on a reference is confined to a consideration of the specific objection taken to the award and that where the only objection taken is to the amount of compensation that alone is the matter referred, and the Court has no power to determine or consider anything beyond it. The ruling in *Narayana Gajapatiraju* v. *Annapurnamma*[3] is also to the same effect. The matter is elucidated further by the Privy Council in *Mt. Bhagwati* v. *Mt. Ram Kali*[4], where Lord Porter has observed: "The Act does not require particulars to be given—it requires only the grounds of objection to be given, and by "grounds" their Lordships think, is meant such of the four grounds mentioned in section 18 (1) as are relied upon. . . . and no further particulars are required in order to comply with the terms of the sub-section." In *Revenue Divisional Officer* v. *Zemindar of Chemudu*[5], it is pointed out that "when an

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1. (1943) 1 M.L.J. 278.
2. (1929) 58 M.L.J. 223: L.R. 57 I.A. 10: I.L.R. 57 Cal. 1148 (P.C.).
3. (1941) 1 M.L.J. 527.
4. (1939) 2 M.L.J. 98: L.R. 66 I.A. 145: I.L.R. (1939) All. 460 (P.C.).
5. I.L.R. (1938) Mad. 479.

objection to the amount of compensation has been taken the Court has jurisdiction to work out the amount of compensation in a manner and on a basis different from that which has been adopted either in the statement of claim before the Land Acquisition Officer or in the objections against the award." While in the present case there is no advertence to the Privy Council ruling in *Mt. Bhagwati's case*[1], the observation in the Madras case is distinguished on the ground that in the present case there is no question of "adopting a different basis of calculation in respect of the compensation awarded to the claimant." There seems to be no warrant for confining the scope of the observation in the Madras case to a narrow compass. The clear statement of Lord Porter that what all is required by section 18 is a mention only of the specific or particular objection or objections among the four objections referred to by the section, to the award, and not any statement of particulars, would indicate that the view suggested in the Madras decision in In re *Zemindar of Ettayapuram*[2] is more in consonance with it than the one favoured in the case under notice.

BHANAMALI CHARAN BHUNIA *v.* DHARANI DHAR BHUNIA, I.L.R. (1943) 1 Cal. 154.

This case holds that a charge of cheating under section 417, Indian Penal Code will not lie for falsely inducing a complainant to compromise a case under section 408. To constitute cheating there must first be a deceit and the person deceived should have been taken in by the misrepresentation. Where the compromise can have no legal effect there is no question of damage to a person either in regard to his property or otherwise. In *Kumaraswami Chetti* v. *Kuppusami Chetti*[3], it was held that the composition or compromise in regard to an offence compoundable only with the Court's permission, is of no legal effect unless the Court has given its sanction. The same view is taken in *Naurang Rai* v. *Kedar Nath*[4]. The composition or compromise in the case of an offence which is non-compoundable will stand *a fortiori*. Even if some promise was made and the case was dropped the promise is not only not enforceable but it will also be open to the complainant to have the case revived if the Magistrate was so disposed. The agreeing to the compromise does not impart any efficacy to the arrangement, and thus, in the circumstances, the procuring of the consent, even if falsely made, cannot amount to the offence of cheating.

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1. (1939) 2 M.L.J. 98 : L.R. 66 I.A. 145: I.L.R. (1939) All. 460 (P.C.).
2. (1943) 1 M.L.J. 278.
3. (1918) 34 M.L.J. 217 : I.L.R. 41 Mad. 65.
4. (1928) I.L.R. 9 Lah. 400.

CHANDRA BHAN BILOTIA *v.* GANPATRAI AND SONS, (1943) 1 Cal. 156.

An interesting question raised in this case was whether arbitrators were bound to act only on what is strictly admissible evidence. Blagden, J., gave a negative answer and held that so long as the principles of natural justice were not transgressed an arbitrator could act on materials which may not be strictly admissible evidence under the Indian Evidence Act. Natural justice is " an expression sadly lacking in precision,"[1] but implies that though the person who is to adjudicate is not bound by the limitations of adjectival law attaching to a trial, the parties to the dispute should always be given a fair opportunity to know, correct or contradict any relevant statement prejudicial to them, *Board of Education* v. *Rice*[2].

In England, in regard to an arbitrator, in *Attorney-General* v. *Davison*[3], Alexander, L.C.B., has observed : " I have always understood that arbitrators are bound by the same rules of evidence as the Courts of law." In In re *Keighley, Maxstead* & *Co. and Bryan Durant* & *Co.*[4], Lord Esher no doubt remarked that an umpire is not bound by the strict rules of evidence strictly observed in a Court. This view has however been repudiated in Re *Enoch* & *Zaretzky Bock* & *Co.*[5], where Farwell, L.J., stated : " If it be taken literally, I can only say, with the greatest possible respect, that I think it is contrary to the law as stated in the Court of Exchequer and contrary to the established rule in our Courts. If all that was meant is that the Court will not be extreme to mark anything done amiss in respect of the reception of evidence unless substantial injustice results . . . then I should agree. It is plain that the Courts do allow considerable latitude, in practice at any rate, to the reception of evidence by umpires but to say as a general proposition that they are not bound by the rules of evidence appears to me to be entirely misleading and likely to produce very great injustice." Nor is the dictum of Lord Esher, in accord with the decision of the House of Lords in *East and West India Dock* v. *Kirk and Randall*[6]. Thus it is clear that an abritrator is bound by the rules of evidence and although parties may agree that the rules of evidence as observed in the Courts shall not be strictly followed, he must not admit and act upon evidence which is obviously inadmissible and which goes to the root of the question he has to decide, *Walford Baker and Co.* v. *Macfie and Sons*[7]. The law as summed up in Halsbury[8] is : Subject to any directions which may be contained in the submission itself, " he should observe, so far as may be practicable, the rules which prevail at the trial of an action in Court, but he may deviate from those rules, provided that in so doing he does not disregard the substance of justice."

Is the Indian law in any way different ? The Evidence Act purports to be a complete codification of the law of evidence and by section 1 it is expressly said not to apply to arbitrators. In *Pratap Singh* v. *Kishan Prasad*[9], it was stated : " An inquiry before the arbitrator should be assimilated as near as possible to proceedings in a trial in a Court of law." A number of decisions have held that an arbitrator is not bound by rules of practice which Courts of law adopt for general convenience nor bound by the adjective law laid down in the Civil Procedure Code and the rules made under it or the rules relating to evidence to be found in the Indian Evidence Act, so long as he acts in consonance with the principles of justice, equity and good conscience ; he has greater latitude than the Courts of law in order to do complete justice between the parties, *Badruddin Hasan* v. *Amir Begam*[10], *Narsingh Narayan Singh* v. *Ajodhya Prosad Singh*[11]. This means only, in the words of Foster, J., in *Abdul Halim* v. *Ismail*[12] that " no doubt an arbitrator is ordinarily free from the fetters of adjective law but that does not make him free from the fundamental principles of justice." The decision in *Suppu* v. *Govinda Charyar*[13] that an award of the arbitrators cannot be set aside on the ground that they have not acted in strict

1. Per Hamilton, L.J., cited in *Local Government Board* v. *Arlidge*, (1915) A.C. 120.
2. (1911) A.C. 179.
3. 4 M'Cl. & Y. 160, 166.
4. (1893) 1 Q.B. 405, 411.
5. (1910) 1 K.B. 327 (C.A.).
6. (1887) 12 A.C. 738.
7. (1915) 84 L.J. K.B. 2221.
8. 2nd edn., vol. 1, p. 652, para 1103.
9. A.I.R. 1932 Bom. 68.
10. (1911) 13 I.C. 520.
11. (1911) 16 C.W.N. 256.
12. A.I.R. 1925 Pat. 465.
13. (1887) I.L.R. 11 Mad. 85, 87.

compliance with the rules of evidence should be understood as in no way militating against the proposition that though the arbitrator enjoys a certain amount of latitude in the matter of reception of evidence and though the rules of the Evidence Act do not strictly apply to him, yet, if he acts in a manner disregarding the " substance of justice " or in violation of the principles of natural justice, his award is liable to be set aside.

BARASAT BASIRHAT LIGHT RAILWAY CO. LTD. *v.* NRISINGHA CHARAN NANDI CHAUDHURI, I.L.R. (1943) 1 Cal. 173.

This case decides a novel point practically uncovered by authority. It holds that the liability of the bed of a natural navigable stream at any point in its course to pass the water received from the upper reaches on to its lower part without material diversion in volume cannot be regarded as an "encumbrance" which will be wiped out on an acquisition of the bed of the stream at the particular point under section 16 of the Land Acquisition Act. In the present case the bed of a natural navigable watercourse under a railway bridge had been acquired in land acquisition proceedings from the plaintiff to whom the watercourse belonged for purposes of the railway. The watercourse had been fetching an income to the plaintiff by way of tolls levied on country craft plying along it. After the acquisition the railway company diverted the water at the point where the bed belonged to them into certain burrow pits excavated along the embankment of the railway line by deepening them and converting the same into a channel. The result was that there was no longer enough water for the craft to ply. In a suit for damages by the plaintiff against the railway company, it was contended that inasmuch as the burden resting upon the acquired portion of the bed of the watercourse of passing the water received by it from its upper portion to its lower portion was an "encumbrance" within the meaning of section 16 of the Land Acquisition Act, it was therefore extinguished by the acquisition proceedings. In *The Government of Bombay* v. *Esufali Salebhai*[1], it was stated that "to acquire land is not necessarily the same thing as to purchase the right of fee simple to it; but means the purchase of such interests as clog the right of Government to use it for any purpose they like". "Land" is defined in section 3 (*a*) as including benefits to arise out of land and section 3 (*b*) suggests that an easement will be an "encumbrance" within the meaning of section 16. That "encumbrance" is sufficiently wide to cover a customary right has been recognised in *George High School* v. *Abdul Karim*[2]. Whether it is an easement or customary right it is one that has come into existence through human agency and is not attributable to natural causes. The dictionary meaning of the term "encumbrance" refers to it as a claim, lien, liability attached to property; as a mortgage, etc., and suggests that it is a burden created by acts or omissions of human beings and not one created by nature. The German "kummer", the equivalent of "cumber" is synonymous with "trouble" and gives a clue to its real meaning, that it is of man's own making.

ADEMMA *v.* SATYADHYANA THIRTHA SWAMIVARU, (1943) 2 M.L.J. 289.

Two points of considerable interest are dealt with in the above decision. Section 3 (2) (*d*) of the Estates Land Act as amended by Act XVIII of 1936 includes within the definition of an estate "any inam village of which the grant has been made, confirmed or recognised by the British Government" and under section 6 every ryot in possession on the 30th June, 1934 or admitted subsequently by a landholder to possession of ryoti land situated in such estate shall have a permanent right of occupancy. Whether a ryot can claim the statutory right of occupancy in inam lands thus turns upon whether the grant was of a *village* and whether the latter term should be understood as subsuming all the lands without any exception being made. The definition of "village" in section 3 (19) is scarcely helpful. It only states that "village" means any local area situated

1. (1910) I.L.R. 34 Bom. 618, 624-625. 2. A.I.R. 1935 All. 895.

in or constituting an estate which is designated as a "village" in the revenue accounts. It does not touch the question whether for purposes of section 3 (2) (*d*) the grant in inam should be of the entirety of the lands or whether a grant of substantially all the lands in inam would suffice. The decision in *Mandalaswami* v. *Lakshminarasamma*[1] only states that even if the lands did not form a village at the time of the inam grant, if subsequently at the time of the confirmation or recognition of the same by the British Government the lands are recognised as constituting a village by the revenue authorities, that will suffice. The decision only states that though the lands concerned had formed part of a village only at the time of their grant they would yet be an estate within the meaning of section 3 (2) (*d*), if subsequently at the time the grant was confirmed by the British Government, they had been recognised as a village with a separate revenue establishment and separate revenue accounts. Construing the section strictly a village can be said to be granted in inam only when the entirety of the lands comprising it are granted see *Secretary of State* v. *Mallayya*[2] and *Secretary of State* v. *Thinnappa Chettiar*[3]. The *Swamigal case*[4] shows that where a grant purports to be a whole village inam the fact that the words "besides poramboke" are not inserted in the grant will not in any way derogate from the plenary character of the grant. Where on the other hand there is evidence to show that what was granted was something less than the total area of the village, that a portion however small had been granted to another or reserved by Government, can the grant admittedly of less than the arithmetical unity constituting the village be nevertheless regarded as a grant of the whole village? In the instant case, the question has been answered in the negative, the grant being of 128.22 acres out of the total area of 158.23 acres. The same view has been taken in *Suri Reddi* v. *Agnihotrudu*[5]. The position may now be taken as settled beyond doubt.

The other point of interest that was raised was whether a grant of lands to the deity of a math for *nitya naivedya deeparadhana* could in the circumstances of the case be regarded as a grant on "service tenure". The importance of the point lies in the fact that if the lands could be so regarded, they will cease to be ryoti land during thc subsistence of the service tenure and no occupancy rights can be acquired therein by a lessee of the lands or a cultivating tenant. In view of the finding that the grant was less than a whole village it was considered by the learned Judges that it was "not necessary to embark on a discussion of the first respondent's contention that the grant here was a grant for service". Their lordships however added: "It may however be mentioned that the entries in the Inam Register are strongly against the contention". It is not clear which particular entry or entries militated in their Lordships' opinion from the grant being regarded as one for service. The observation no doubt is obiter but in view of the importance of the question the matter deserves to be probed. In passing it may be recalled that the ruling in *Sadasivarayudu* v. *Vekataswami*[6] has recognised that even an entire village may fall within the scope of the exemption from ryoti land afforded by section 3 (16) (*c*). Ordinarily as indicated in *Radhakrishna* v. *Balambhat*[7] in the case of a grant for service either the grantee should have been appointed to a particular office the performance of whose duties was intended to be remunerated by the grant of land or the grant must have annexed to it any condition of service, the service being of a specific character, military, religious or village service. Section 3 (16) (*c*) refers only to the object of the grant. In the case of a devadayam granted for the support of a temple or for the performance of any service in the temple can it be said that it is a service grant? Does the fact that the grantee is the idol itself make any difference? As pointed out by Varadachariar, J., in *Board of Commissioners for Hindu Religious Endowments, Madras* v. *Veeraraghavalu*[8]: "The principle of the legal personality of an idol and of the

1. C.R.Ps. 1007 to 1014 of 1942.
2. (1932) 63 M.L.J. 649 (P.C.).
3. (1943) 2 M.L.J. 382 (P.C.).
4. (1942) 2 M.L.J. 367 : L. R. 69 I. A. 22 : I.L.R. (1942) Mad. 893 (P.C.).
5. (1943) 2 M.L.J. 528.
6. (1931) 62 M.L.J. 598.
7. I.L.R. (1938) Nag. 27.
8. (1937) 2 M.L.J. 368.

vesting of property in such personality cannot be taken quite literally. . . . . The purpose of making a gift to a temple is not to confer a benefit on God but to confer a benefit on those who worship in that temple, by making it possible for them to have the worship conducted in a proper and impressive manner". Thus the maintenance of a temple or the performance of any service therein is really for the benefit of the public. By the objects being meticulously carried out a service is done to the members thereof. So regarded it is not merely a case where the grant is made, for instance, in favour of a pujari or a cymbal player or a florist serving in the temple that would fall within the ambit of a service grant but also a case where the grant is made to the institution itself either for its maintenance or for such purposes as *nitya naivedya deeparadhana.* In Appeal No. 193 of 1940, while holding that where the grant had been in the name of the deity and there had been no alienation by the trustee of the temple, the disputed alienation having been made by an archaka claiming the land as his, section 44-B of the Hindu Religious Endowments Act cannot be properly invoked, the learned Judges seem to have observed that the finding of the lower Court that the lands "do not constitute a grant for the performance of a charity or service stands". This remark is also obiter and is moreover not in accord with the observations of Varadachariar, J., cited *supra,* that the grant standing in the name of the deity is not to be understood in its literal sense and that the grant is really for the benefit of the publie and serves them that way. In Selections from the Records of the Madras Government New (Revenue) Series: No. 1: A Collection of Papers relating to the Inam Settlement in the Madras Presidency,[1] it is stated that inams granted for the support of pagodas, muttums, mosques and durgas, Christian churches, etc., are inams for religious service. This shows that the Government itself seems to have had a consciousness that all inams granted in favour of a temple will be religious service inams. It is submitted that there is no warrant for departing from that view in construing section 3 (16) (*c*) of the Estates Land Act.

JITENDRA CHANDRA RAY CHAUDHURI *v.* S. N. BANERJEE, (1943) 1 Cal. 101. A question turning on the construction of section 63 of the Indian Contract Act, on which a cleavage of opinion between the Madras and Calcutta High Courts is revealed, fell to be decided in this case which holds that it is open to a promisee to remit a portion of the obligation without consideration therefor or a fresh agreement, though the obligation on the part of the promisor to perform the unremitted part still continues. The Madras view is to be found in *Ramaswami* v. *Rudrappa*[2], where it has been held that no doubt no consideration is necessary if a portion of the debt is actually remitted but that actual remission is not completed until the creditor accepts the part payment in full satisfaction. Reliance was placed in support of the view on illustrations (*b*), (*c*) and (*d*) to section 63. Examining the section itself it is apparent that it has three limbs and it provides for the promisee acting in three different ways. In the first place he can dispense with or remit performance of the obligation either wholly or in part; secondly, he can at his discretion extend the time for performance of the contract; or lastly, it is open to him to accept any satisfaction which he considers proper. Turning to the illustrations, while illustration (*a*) contemplates a case of total remission, illustrations (*b*), (*c*) and (*d*) fall within the purview of the third clause under which a substituted satisfaction is accepted and the original obligation is extinguished. This analysis of the section shows that quite apart from accepting performance of less than what is due under the contract, the promisee can act under the first part of section 63 and remit performance either wholly or in part. This would give a meaning to every part of the section and would avoid the first part being deemed otiose or as overlapping the third part. The weakness of the Madras view is that this distinction does not seem to have been appreciated.

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1. Published in 1906, p. 350. para 11 citing G.O. No. 337 Rev. dated 24th Feb. 1871; *see also* Land Tenures in the Madras Presidency by Sundararaja Iyengar, 2nd edn., pp. 260, 261.
2. A.I.R. 1939 Mad. 688.

While under the third clause of the section the original contract is altogether extinguished, under the first part a portion of the performance may be remitted and the rest left intact. The reference in the Madras case to illustrations (*b*), (*c*) and (*d*) indicates that the learned Judges thought that a case of remission fell under the last clause of section 63. Again, that for section 63 to apply, an entire extinction of the contract is not necessary is made clear by the second part of the section which entitles the promisee to extend the time for the performance of the contract. Nor is there anything in section 63 to limit its operation to cases where the performance has already fallen due. It cannot be said that where the alleged remission relates to a future liability it can amount only to an agreement to remit. There is no reason why a future liability, such as for instance to pay interest on the principal borrowed, may not be remitted in *praesenti*. Since such a case also will be one of actual remission no bar of evidence can arise under section 92 of the Evidence Act. *Maung Pu* v. *Maung Po Thaut*[1]. The statement expressing such remission, even if oral, does not contradict or vary the terms of the original contract. The terms remain intact and the effect of the remission comes in only after the terms operate fully.

Should the remission then in whole or in part, orally or in writing, of the original obligation be supported for its efficacy by consideration? In *Chunna Mal—Ram Nath Firm* v. *Mool Chand—Ram Bhagat*[2] the Privy Council has laid down that under section 63 a promisee can effectually dispense with performance of a contract in whole or in part without either an agreement by the promisor or consideration for the dispensation. According to the Privy Council "the language of the section does not refer to any such agreement and ought not to be enlarged by any implieation of English doctrines". In their treatise on the Indian Contract Act (6th edition, p. 363 f. n.) Pollock and Mulla remark that the Privy Council decision in the Lahore case "appears to overrule the opinion (in any case difficult to understand) of the Rangoon High Court that if the remission is in the form of an agreement it requires new consideration". In the result the view found in the case under notice that there can be actual remission of a part of the obligation under a contract though the rest of it remains to be performed and that it is open to the promisee by a unilateral act of grace to so absolve the promisor without any consideration seems to be justified both by the language of section 63 and the exposition by the Privy Council of its scope.

GAJA NAND CHAUDHURI *v.* HARI BUX LAHOTY, I.L.R. (1943) 1 Cal. 195.

This decision holds that where an agreement constituting an adjustment of a decree is oral, evidence of it is not inadmissible under section 92 of the Evidence Act in proof of the same. The proposition was laid down on objection being raised to the reception of such evidence in the course of an application by the judgment-debtor under Order 21 rule 2, Civil Procedure Code for a notice to issue to the decreeholder to show cause why the adjustment of the decree should not be certified. The point however is one regarding which, in the words of Pandrang Row J., in *Papamma* v. *Venkayya*,[3] "there is a conflict of opinion well nigh irreconcilable". *Debendra Narain Sinha* v. *Sourindra Mohan Sinha*[4] and the unreported decision of the Madras High Court in Second Appeal 62 of 1920 represent the two contrary views and the other cases more or less follow the one or the other of the two. According to the former decision the words "any matter required by law to be reduced to the form of a document" in the earlier part of section 92, Evidence Act are controlled by the expression "as between the parties to any such instrument or their representatives in interest" in the later part of the section which are applicable only in the case of documents of a dispositive character and the former words have therefore a narrower scope in section 92 than in section 91 and cannot cover the case of a decree; so much so,

1. (1928) I.L.R. 6 Rang. 191.
2. (1928) I.L.R. 9 Lah. 510; L.R. 55 I.A. 154: 55. M.L.J. 1. (P.C.).
3. (1935) I.L.R. 58 Mad. 994: 69. M.L.J. 451 (F. B.).
4. A.I.R. 1914 Cal. 697: 24 I.C. 391.

evidence of an oral agreement adjusting the decree is not shut out by the section. This view has been followed in a later decision of that High Court in *Ananda Priya* v. *Bijoy Krishna*[1]. In Madras, in Second Appeal No. 62 of 1920, Napier J., considered the result of the Calcutta ruling in *Debendra Narain Sinha's case* as "certainly startling" and thought that under that view immediately after a decree "it would be open to one of the parties to come into court with a fresh suit the next day saying that directly after the decree was passed the parties made an agreement to vary its terms". The criticism however overlooks the provisions of section 47 and Order 21, rule 2, Civil Procedure Code. Napier J, also thought—Krishnan J. agreeing—that a decree was an instrument between the parties to the suit in which the decree was passed. This point does not allow for the real nature of a decree. The decision in the second appeal was however followed in *Raja of Kalahasti* v. *Venkatadri Rao*[2] where it was held that an oral agreement to adjust a decree offends against the terms of section 92 of the Evidence Act and cannot be proved; and again by a single Judge in *Gopalakrishna Iyer* v. *Sankara Iyer.*[3] The Full Bench ruling in *Papamma* v. *Venkayya*[4] has however taken a different view regarding the applicability of section 92 to decrees.

In Allahahad, in *Lachhman Das* v. *Baba Ramnath Kalikamliwala,*[5] Walsh J, observed obiter, that an oral agreement adjusting a decree is clearly a matter contradicting or varying the terms of the original decree and that evidence of it cannot therefore be admitted by reason of section 92. A later ruling in *Ganga Dihal Rai* v. *Ram Oudh*[6] has dissented from that view. In that case on the taking out of execution by the decreeholder, the judgment-debtor set up an oral adjustment and asked the Court to record it, the application being in time, *i.e.*, within 90 days as required by Article 174 of the Limitation Act. Sulaiman A.C.J., held that section 92 of the Evidence Act is not a bar to the agreement being proved, that a decree is not an instrument between the parties in the sense in which that expression is used in that section and is not covered by it; that proof of a subsequent oral agreement cannot be said to amount to varying or contradicting the decree and hence oral evidence of the adjustment under which a part of the decree was paid and the rest agreed not to be executed against the judgment-debtor is not inadmissible.

In Bombay in *Kalyanji Dhana* v. *Dharamsi Dhana and Co.*[7], a similar opinion has been expressed and it is stated that if the adjustment is certified as required by law it can be acted upon and proved and that it is not necessary that such agreement should be in writing. The same view has been adopted by the Rangoon High Court in *Ma Shwee Pee* v. *Maung San Myo*[8] and by the Lahore High Court in *Abdul Karim* v. *Hakam Multani Lal.*[9]

The Full Bench ruling of the Madras High Court in *Papamma* v. *Venkayya*[4] has pointed out that a decree does not fall within the purview of section 92 of the Evidence Act so as to preclude evidence of a subsequent oral adjustment being let in and that the correct approach to the question had been missed in the earlier decisions. According to Pandrang Row, J., a decree is not an act of the parties at all but an act of Court. Only a Court can bring it into existence and only a court can vary or nullify it. A decree or its terms cannot be modified except by the Court; it is a matter of procedure and not of rules of evidence. The parties cannot by their agreement alone vary or modify the terms of a decree whether the agreement is written or oral. The rule of exclusion in section 92 implies that but for it the agreement could in law vary the terms. Where, therefore, no such variation by agreement, whether written or oral, is possible, the rule of exclusion cannot apply, and this is the case with a decree. The law does not contemplate a variation of decrees of Court by mere agreements. Artempts to so vary are guarded against

1. A.I.R. 1926 Cal. 643 : 91 I.C. 705.
2. (1927) I.L.R. 50 Mad. 897 : 53 M.L.J. 533.
3. A.I.R. 1930 Mad. 673.
4. (1935) I.L.R. 58 Mad. 994 : 69 M.L.J. 451 (F.B.).
5. (1921) I.L.R. 44 All 258, 264.
6. A.I.R. 1929 All 79.
7. A.I.R. 1935 Bom. 303.
8. (1928) I.L.R. 6 Rang. 573.
9. (1933) I.L.R. 14 Lah. 668.

not by any rules of evidence but by rules of procedure, such as those relating to amendment of decrees, appeal, review and execution.

The above exposition coupled with the repudiation of its earlier view by the Allahabad High Court in its later pronouncement and the unanimity of opinion in the other High Courts show that provided that the agreement can be recorded or certified under Order 21 rule 2 of the Civil Procedure Code being within the time permitted by law, it can be proved for such purpose ; and the conclusion reached in the case under notice is thus in accord with the previous rulings on the point.

KSHETRA MOHAN DAS *v.* BASU, I.L.R. (1943) 1 Cal. 313.

The nature of the relationship that arises between the parties, where an employee deposits a sum of money with his employer by way of security for the due performance of his services, whether it constitutes a loan or creates a trust has often come up before the courts and has been marked by a cleavage of judicial opinion which still persists. The principles in cases of this kind seem to be clear and settled but their application to concrete cases is often a matter of great difficulty. It must no doubt depend essentially on the facts and circumstances of each case. But it is the particular line of approach to the question that has made all the difference in regard to the result.

In *Halsbury's Laws of England*,[1] it it stated that property which is in the possession of the bankrupt for a specific purpose does not ordinarily pass to the trustee but is clothed with a species of trust and is subject to the same principles as trust property. If a specific purpose is declared a trust results. In *Toovey* v. *Milne*,[2] in regard to the return of a sum of £ 120 advanced to a person for settling with his creditors on the settlement not being effected, Abbot, C.J., remarked that as the money was advanced for a specific purpose it was therefore clothed with a specific trust. So also in *Farley* v. *Turner*,[3] money had been sent to a bank with an intimation that it was to be applied for a particular purpose. Due to certain reasons the money was never applied for the specific purpose. It was held that there was a trust in respect of the amount. Likewise in *Edwards* v. *Glynn*,[4] money had been advanced to save a bank from a run on it, but the purpose could not be achieved. The money was therefore returned to the lender. On the question whether the advance gave rise to a loan or a trust, Earle J., observed "this was a specific advance for a specific purpose on the understanding that the money if not used for that purpose should be returned" and therefore gave rise to a trust. The principle thus seems to be that when a sum of money is handed to another person who accepts it for a purpose declared at the time, a binding trust is constituted in respect thereof. On this test the fact that the depositee is a bank is immaterial. Nor does it matter that in a certain contingency the depositee might have recourse to the deposit or that there is a stipulation to pay interest on the deposit money. It is true that a trustee cannot deal with trust property for his own benefit. The rule however is not inflexible. It is subject to the qualification "unless otherwise provided for", *Bray* v. *Ford*.[5] The instrument of trust may empower such user. *In re Sykes*[6] affords an illustration. The ruling in *Gee* v. *Liddel*[7] shows how a provision for payment of interest is not incompatible with trust relationship. There the testator had directed his executor to stand possessed of £ 2000 upon trust to retain the same in his own hands paying interest at 4 per cent. or to invest it and pay the interest to his daughter for her separate use during her life. The provision thus permitted the trustee to retain the money in his own hands and pay interest at a specified rate to the beneficiary, the trustee presumably being entitled to make such use of the capital by way investment or otherwise. Yet no question arose as to the direction creating a trust.

The Indian law does not seem to be different. Section 51 of the Indian Trusts Act states that a trustee "may not use or deal with the trust property for his own

1. Vol. 2, p. 228, Hailsham edition.
2. (1819) 2 Bl. & Ald. 683 ; 106 E.R. 514.
3. (1856) 26 L.J. Ch. 170.
4. (1859) 2 El. & El. 29 : 121 E.R. 12.
5. (1896) A.C. 44, 51.
6. (1909) 2 Ch. 241.
7. (1866) 35 Beav. 621 ; 55 E.R. 1038.

profit." It is the word "may" and not the word "shall" that is employed. Anyway, in *Official Assignee* v. *Krishnaji Bhat*,[1] it is recognised that it is open to the settlor to make a provision to the contrary and remove the trustee's disability without the trust being in any way affected. In that case certain monies were handed over in trust to a firm of jewellers and acting on the permission of the author of the trust, the trustees instead of keeping the trust funds separately or earmarked used it in their private business, paying interest annually on the deposit money. It was held that these facts notwithstanding, the trust relationship was not affected ; see also *Official Assignee* v. *Muthayee.*[2]

The permission to use the security deposit as a necessary implication arising from a provision for payment of interest on the deposit amount coupled with the absence of any stipulation to treat the deposit as "a segregated fund" has led the courts in a number of cases to treat the deposit as a loan only and as negativing a trust : see *Messrs. Arbuthnot & Co.* v. *Sabapathy Mudaliar*,[3] *Malvankar* v. *Credit Bank of India Ltd.*,[4] *In re Manekji Petit Manufacturing Co., Ltd.*[5] The same view has been taken in some decisions even subsequent to the ruling of the Privy Council in *Krishnaji Bhat's case*,[1] see *The National Petroleum Co.. Ltd.* v. *Popatlal Mulji*,[6] *Maheswari Brothers* v. *Liquidators, Indra Sugar Works*,[7] and same case on appeal.[8] The same conclusion has been reached also in cases where there was no stipulation for payment of interest on the deposit, In the matter of *Annapurna Co., Ltd.*,[9] *Ram Chand* v. *Mohamed Akram Khan Saheb*[10]. That where at the time of making the deposit the specific purpose for which it is made is declared and the parties are fully aware of it, it is a trust that arises notwithstanding a provision for payment of interest on the deposit amount is the opinion laid down in In re *Bengal Zemindari and Banking Co., Ltd.*,[11] In the matter of the *Hindusthan Commercial Bank Ltd.*,[12] *Gopalkrishnan* v. *Official Liquidator, T. N. & Q. Bank Ltd.*[13] In the first of these cases however it had been expressly stated at the time of the deposit that the money was to be deemed to be held in trust, and referring to that provision Lort-Willams J., remarked. "If it had not been for these specific terms, the fact that the bank had agreed to pay interest upon the security might have militated against the position taken up by the petitioner, because in the ordinary way, if the bank had to pay interest upon the security, it might be assumed that it was intended that it should use the money in the banking business like any other deposit so as to enable it to earn the interest which it had to pay to the cashier on his security deposit." That a provision for the trustee deriving benefit through the user of the trust fund is not inconsistent with the trust relationship is borne out by section 3 of the Indian Trusts Act where the trustee (*the owner*) is contemplated as not disqualified to be a beneficiary as well. Likewise that a provision for payment of interest on the deposit is not incompatible with the continuance of the fiduciary relationship is recognised by decisions, see In re *Alliance Bank of Simla Ltd*[14]., and In re *Fazalbhai Mills Ltd.*[15] The decisions advocating the view, that in the case of security deposits, only a debtor and creditor relationship arises have failed to appreciate that the position is the other way in English law whenever the special purpose for which the deposit is made is declared at the beginning, that the Indian law is not different from the English law, that the only relevant factor or criterion in such cases is whether the deposit was declared to be made for a specific purpose and the parties were aware of that fact and that when once a trust relationship springs into existence it will not be affected or extinguished by a provision for payment of interest on the deposit or by authorisation of the user of the deposit money by the trustee in his business. The view taken in the case under notice is in conformity with the law so set out.

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1. (1933) 65 M.L.J. 1 : I.L.R. 56 Mad. 570 : L.R. 60 I.A. 203 (P.C.).
2. 1937 M.W N. 493.
3. (1912) 23 M.L.J. 221.
4. (1914) 27 I.C. 343.
5. A.I.R. 1932 Bom. 311.
6. (1936) I.L.R. 60 Bom. 954.
7. I.L.R. (1938) All. 896.
8. I.L.R. (1942) All. 242 (F.B.).
9. A.I.R. 1926 All. 397.
10. A.I.R. 1937 Lah. 444.
11. I.L.R. (1937) 2 Cal. 305.
12. A.I.R. 1938 Mad. 651.
13. (1939) 1 M.L.J. 209.
14. A.I.R. 1924 Cal. 818 : 28 C.W.N. 721.
15. (1936) 38 Bom.L.R. 542 : A.I.R. 1936 Bom. 296.

NIRANJAN DAS MOHAN *v.* ENA ELIZABETH SINGH, I.L.R. (1943) 1 Cal. 340.

One of the points decided in this case was that in regard to a marriage solemnised under the Special Marriage Act, 1872, it would be sufficient if, at the time of making the declaration required by the statute, neither of the parties professed the Christian or any of the other specified religions and that what the parties then were or were not at heart is irrelevant. Section 2 does not postulate the presence of a positive element, but requires only a negative, namely, that the parties to the marriage thereunder should not profess any of the specified religions. This is borne out and implemented by para 2 of the second schedule which sets out the form in which the declaration by the parties should be made before the Marriage Registrar. The statement should be : " I do not profess the Christian . . . . religion." To what point of time that fact should relate finds no mention in that para but by correlation with para 1 it falls to be understood that it refers to the condition at the time of the marriage. Two remarks fall to be made : firstly, the statute does not call for an affirmation of faith ; in fact, neither of the parties may have any religious faith at all : secondly, antecedent facts are irrelevant, for it is the state existing at the time of the declaration that has to be expressed. What then does it matter if either of the parties had been born a Christian, or had been baptised at the Christian church, or had attended church regularly or had been treated as a Christian ? None of these factors is incompatible with the party not having any real faith in Christianity. It may be a superficial label that the party was all along wearing. Though to prove one's faith what one believed at heart may have to be probed, to prove that one has no faith one's declaration must be self sufficient for true faith is inconsistent with suborning. The term " profess " means " openly declare or affirm allegiance to or faith in". The Special Marriage Act requires only the statement of a negative and when that has been done, surely there is no necessity for anything more. It was perhaps considerations like these that have led the Courts to hold that a declaration under Act III of 1872 for purposes of marriage could not be taken as an abjuration of religion for all purposes but should be understood merely as a statement for the occasion only and for the purposes of the Act ; see In re *Gnanendranath Roy*[1], *Vidyagavri Harbovandas* v. *Naraindas Kashidas*[2], and *Emperor* v. *Walter*[3].

That the state of mind of the declarant is not material follows also from the fact that the Court will otherwise be called upon to enter into an elaborate inquiry into the religious faith of the parties which, from the very nature of things, will be impracticable in most cases. Further section 17 of the Act invalidates a marriage only on the four grounds set out therein, of which belonging at heart to some one of the specified religions contrary to the terms of the declaration is not one. That other grounds will not lead to the avoidance of the marriage is apparent from section 21 which, only prescribes a penalty for signing a false declaration but, does not avoid the marriage itself on the ground of the false recital.

AHMED MAHOMED *v.* BAI FATMA, I.L.R. (1943) Bom. 38.

Excursions into the tangled jungle of juristic semantics are no doubt not desirable, but often a seemingly simple word gives rise to conflicting interpretations detracting from the certainty that should characterise a rule of law and its significance falls in consequence to be ascertained. In the instant case appropos of the question whether on attainment of majority a child's right to maintenance against its father under section 488, Criminal Procedure Code will cease, it was held that in the context the word ' child ' is used in reference to the father and without qualification of age—the only qualification being that it should be unable to maintain itself—and hence attainment of majority *per se* will not lead to the cessation of the right to maintenance that was running.

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1. (1923) I.L.R. 49 Cal. 1069 at 1072.
2. A.I.R. 1928 Bom. 74.
3. A.I.R. 1934 Oudh 155.

Section 488 is not a new provision enacted in 1898. The same provision was found in the code of 1882 and the codes of 1875 and 1872 and section 316 of Act 25 of 1861 contained a provision similar to section 488 (1). The dictionary meaning of the term ' child ' does not take the matter far. A ' child ' is said to mean *inter alia* (1) a young person of either sex, especially one between infancy and youth ; (2) a male or female descendant in the first degree. In *Krishnaswami Ayyar* v. *Chandravadana*[1], Sankaran Nair, J., observed that in England the word ' child ' has got apparenily various statutory definitions, but that in the absence of any definition or anything to the contrary in an Indian enactment like the Criminal Procedure Code, a ' child ' means a person who has not reached full age, a person who is incompetent to enter into any contract, that is, a person below 18 years of age. Another Madras ruling, *In re Moideen*[2], by its approving reference to the decision in In the matter of *the petition of W. B. Todd*[3], which had held that a child though it may have attained majority, if incapable of maintaining itself, will have a right of maintenance against its father seems to favour a more liberal interpretation of the term ' child ' than that found in the earlier Madras case. A still later Madras ruling, *Kent* v. *Kent*[4], has also taken the view that a grown up child (a major) will be entitled to get maintenance if it is unable to maintain itself, from the father if he has the means. The construction adopted in *Krishnaswami Ayyar's case* has however been followed by the Calcutta High Court in *Hemantakumar Banerji* v. *Manorama Debee*[5], by the Lahore High Court in *Mt. Shanno Devi* v. *Daya Ram*[6] and by the Judicial Commissioner's Court of Nagpur in *Gangaramsa* v. *Vishnusa*[7]. In Lahore, however, a Judge of the Punjab Chief Court, Chevis, J., in *Bhagat Singh* v. *Emperor*[8], had held that the reference to age is purposely omitted in section 488, the object being that any son or daughter should be entitled to maintenance whatever his or her age may be, so long as he or she is unable to maintain himself or herself. The rulings in Burma are not uniform but may in the main be treated as supporting a liberal rather than a narrow interpretation of the term ' child.' In *Thambuswami Pillai* v. *Ma Lone*[9], Sir Charles Fox, J., observed : " I hesitate to adopt the view of Sankaran Nair, J., in *Krishnaswami Ayyar* v. *Chandravadana*[1], without further argument, for it appears to me that the legislature may have intended to make a father liable for the maintenance of his child throughout its life, if owing to some mental or corporeal defect it is unable to maintain itself." The ruling in *Baran Shanta* v. *Ma Chan Tha May*[10], is valuable for the enunciation of the principle that where the child is a minor, the father if he is a man of means cannot be absolved of his liability to maintain the child on the ground that the child is able to earn, since it would be contrary to public policy to encourage child labour even if the parties belong to the labouring classes. Caution exhibits itself in the remarks of Heald and Brown, JJ., in *U Ba Thaung* v. *Ma Aye*[11], that " there is authority for the view that the provisions of section 488 as to children cannot apply after the child has attained the age of majority, but cases undoubtedly do arise where a son or daughter after attaining the age of majority is unable to maintain itself and we should hesitate to lay down as a rigid rule that in no such case could an order of maintenance in favour of a child be enforced as regards a major." A firmer note is discernible in *Ma E Mya* v. *U Ke Ke Gyi*[12], where it was stated " The word 'child' merely expresses a relationship which may exist whether the child is under the age of majority or over the age of majority. A child which has reached majority may for some reason be unable to maintain itself, in which case the parent will under section 488, Criminal Procedure Code be liable to maintain it." The decision in *Ma E Shi* v. *U. San Kai*[13], is the converse of *Baran Shanta's case* and lays down that the capacity of a child to earn will be relevant in considering whether it could get

1. (1913) 25 M.L.J. 349 : I.L.R. 37 Mad. 565.
2. (1913) 25 M.L.J. 355.
3. (1873) 5 N.W.H.C.R. 237.
4. (1925) 49 M.L.J. 335 : I.L.R. 49 Mad. 891 at 896.
5. (1935) I.L.R. 62 Cal. 639.
6. A.I.R. 1933 Lah. 1026.
7. (1922) 65 I.C. 631.
8. (1910) 6 I.C. 960.
9. (1916) 37 I.C. 311.
10. (1924) I.L.R. 2 Rang. 682.
11. (1932) I.L.R. 10 Rang. 194.
12. A.I.R. 1937 Rang. 370.
13. A.I.R. 1939 Rang. 67.

maintenance from the father after attaining majority. The Patna High Court has also construed the term ' child ' liberally in *Mt. Khedani Rajwarin* v. *Lagan Singh*[1]. The Court observed " There is no limit of age placed by section 488 for the maintenance allowance awarded under that section to be paid. As there is no express specification in the Indian law, no limit can at all be placed. The omission to define the age was probably intentional so as to allow the maintenance to continue even throughout the life, if owing to some mental or corporeal defect the person is unable to maintain himself."

These are weighty observations and the considerations favouring a liberal construction of the term ' child ' are many and forceful ; still in view of the conflict of judicial opinion on a matter which is bound to come up before the Courts not infrequently it is to be desired that the legislature sets the matter at rest one way or the other.

NAGINDAS GOKULDAS *v.* BHIMRAO DAMU, I.L.R. (1943) Bom. 117.

This decision deals with the power of a *de facto* guardian of a Hindu minor to bind the latter in respect of a promissory note passed by him on behalf of the minor, the debt being incurred for necessary purposes. It lays down that the minor cannot be bound and recourse cannot be had against his estate for the recovery of the amount due under the note. The guardian in the instant case was the minor's paternal grandmother and the promissory note sued upon was the last of a series, the first of them having been executed by the minor's father.

The scope of a guardian's authority in these matters has been considered from four aspects : (1) whether a guardian can bind the minor only by charging his estate ? (2) even if he can bind the minor otherwise, can that be done only in respect of an *antecedent* liability arising under the personal law of the minor by which he would be bound (3) is it further essential that in such cases the document by which the minor is sought to be bound should be appropriately worded so as to indicate *ex facie* that the obligation is one intended to be discharged out of the minor's estate ? and (4) whether it will make any difference if the guardian is a *de facto* and not a *de jure* guardian.

The first of these questions was practically answered in the negative in *Sudarsana Rao* v. *Dalayya*[2], though incidentally only, and it was there pointed out that the decision of the Privy Council in *Zemindar of Polavaram* v. *Maharajah of Pittapur*[3], cannot be deemed to have disapproved of the rule laid down by a Full Bench of the Madras High Court in *Ramjogayya* v. *Jagannadham*[4], that the decree can be passed against a minor in cases in which the minor's estate would have been liable for the obligation incurred by the guardian, under the personal law to which he is subject. In (1943) 2 M.L.J. N.I.C. at page 29 it was pointed out : " nevertheless it looks from the language (in the *Polavaram Case*), as if the Privy Council approved the view that, if the defendant is a minor at the time of the transaction in question, he could not be held personally responsible for the payment of the debt, as a rule of law." Three decisions of the Privy Council may be said to have a bearing on the questions propounded. In *Waghela Rajsanji* v. *Shekh Masluddin*[5], Lord Hobhouse remarked : " They conceive that it would be a very improper thing to allow the guardian to make covenants in the name of his ward, so as to impose a personal liability upon the ward." In *Inder Chunder Singh* v. *Radha Kishore Ghose*[6], the Judicial Committee observed : " The contention that the mother and widow . . . . had power to bind the minor by contract was abandoned in the Court below and their Lordships are of opinion that such a contention could not be sustained." Nearly

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1. (1920) 61 I.C. 64.
2. (1943) 1 M.L.J. 339.
3. (1936) 71 M.L.J. 347 : L.R. 63 I.A. 304 : I.L.R. 59 Mad. 910 (P.C.).
4. (1918) 36 M.L.J. 29 : I.L.R. 42 Mad. 185 (F.B.).
5. (1887) I.L.R. 11 Bom. 551 (P.C.).
6. (1892) I.L.R. 19 Cal. 507, 511.

half a century later, in *Zemindar of Polavaram* v. *Maharajah of Pittapur*[1], Sir Shadi Lal said : "They (the High Court) also found that as the defendant was a minor at the time of the transaction in question, he could not be held personally responsible for the payment of the debt. This finding has not been contested and as the claim for the personal liability of the defendant is negatived the plaintiff is not entitled to recover the money from the 'general assets' of the defendant." Having regard to the specific mention by the Privy Council in the first of these cases that the Indian law on the matter was the *same* as the English law, that the principle laid down was really one of *justice and equity* and that there was *no system of law where a contrary rule prevailed*, it looks as if the Judicial Committee intended to lay it down as an absolute rule that the guardian could not make a covenant in the name of the minor so as to impose a personal liability on him or his general assets. In that view it has been held in some cases that even where there is a legal necessity, if the minor is to be bound, it can be done only by the guardian charging the minor's property, *Maharana Shri Ranmalsingji* v. *Vadilal Vakhatchand*[2], *Keshav* v. *Balaji*[3], *Shankar* v. *Nathu*[4]. A number of other cases have permitted a relaxation of the rule on special facts. It has thus been held that where the act of the guardian is but an affirmation or continuation of a pre-existing liability that would have bound the minor under his personal law, the minor cannot impugn it, *Subramania Aiyar* v. *Arumugha Chetty*[5], *Ramjogayya* v. *Jagannadhan*[6], *Satyanarayana* v. *Mallayya*[7], *Bhawal Sahu* v. *Baijnath Pertab Narain Singh*[8], *Annappagauda* v. *Sangidigayppa*[9]. Some decisions have suggested that when there is a legal necessity the guardian may borrow under a bond or note for the first time and lay the minor's estate liable therefor, *Nathuram* v. *Shoma Chhagan*[10], *Tulsidas* v. *Vaghela Raisingji*[11], *Imperial Bank of India* v. *Veerappan*[12]. It has also been held that if a testamentary guardian in continuing a running business left by the testator in accordance with his directions is obliged to borrow for the purposes of such business, the creditors of the business can proceed directly against the assets for liability properly incurred by the guardian, in the latter's right to indemnity in respect of such acts, *Vishwanath* v. *Raghunath*[13]. In regard to these cases recognised as exceptions, the decisions have however suggested that the document under which the liability is incurred should be so drawn up as to exhibit the liability of the estate therefor by the use of appropriate words, see *Bhawal Sahu* v. *Baijnath Pertab Narain Singh*[8], *Keshav* v. *Balaji*[13].

Assuming that the principles indicated constitute a correct assessment of the position, there is still considerable conflict of judicial opinion whether a *de facto* guardian stands on the same footing as a lawful guardian. *Hanooman Prasad's case*[14] has no doubt stated that a *de facto* manager of a minor's estate can charge the estate and borrow if there was legal necessity or benefit. The case was however one where the person managing the minor's estate happened to be his mother, a lawful guardian. Whether the observations of the Judicial Committee in that case are to be understood in that background or divorced from it has itself given rise to different views: see the opinions of the learned Judges in *Tulsidas* v. *Vaghela Raisingji*[11] In *Chennappa* v. *Onkarappa*[15] it has been held that a *de facto* guardian cannot make an acknowledgment as a lawful guardian within the meaning of section 21 of the Limitation Act, though it was recognised that by reason of the decisions, the acts of a *de facto* guardian bind the estate of a minor if done under a compelling necessity. Whether the power so stated will include a power to bind the minor by a covenant entered into in his name is however debatable. In *Arumugham Chetti* v. *Duraisinga*

1. (1936) 71 M.L.J. 347 : L.R. 63 I.A. 304 : I.L.R. 59 Mad. 910 (P.C.).
2. (1894) I.L.R. 21 Bom. 61.
3. (1932) 34 Bom. L.R. 996.
4. (1932) 34 Bom. L.R. 1001.
5. (1902) I.L.R. 26 Mad. 330.
6. (1918) 36 M.L.J. 29 : I.L.R. 42 Mad. 185 (F.B.).
7. (1934) 68 M.L.J. 540 : I.L.R. 58 Mad. 735 (F.B.).
8. (1907) I.L.R. 35 Cal. 321.
9. (1906) I.L.R. 26 Bom. 221 (F.B.).
10. (1890) I.L.R. 14 Bom. 562.
11. (1932) I.L.R. 57 Bom. 40 (F.B.).
12. (1934) 67 M.L.J. 573 at 580.
13. (1937) 40 Bom.L.R. 458.
14. (1856) 6 M.I.A. 393.
15. I.L.R. (1940) Mad. 358 (F.B.).

Tevar[1], it was held that persons purporting to act as *de facto* guardians and to incur debts in good faith for the benefit of a minor could not bind the minor's property by their acts if in fact they had no legal status as guardians, see also *Swaminatha Odayar* v. *Natesa Iyer*[2]. In view of the conflicting opinions expressed regarding the guardian's power to bind a Hindu minor on a covenant entered into by him on behalf of the minor and to lay his estate open for realisation of amounts that might become due, a decision of the Judicial Committee explaining the scope of their observations in the *Polavaram case* and the earlier decisions is highly to be desired.

TOTARAM ICHHARAM *v.* DATTU MANGU, I.L.R. (1943) Bom. 138.

This case deals with an important point of law. Order 39, rule 7, Civil Procedure Code, provides that the Court may on the application of any party to a suit make an order for the detention, etc., of any property which is the subject-matter of such suit or as to which any question may arise therein. In the instant case, the question was whether a person who sought leave to sue in *forma pauperis* can, before such leave was given, apply to have a commissioner appointed to take an inventory of property so as to prevent the defendant from making away with it or whether he is bound to wait till his application for leave was disposed of before the request can be granted. The contention urged against the appointment of a commissioner at that stage was that till leave in the pauper application was granted there was no suit and hence there would be no party to a suit within the meaning of Order 39, rule 7. In *Purna Chandra Chabri* v. *Tara Prasad Maity*[3], in holding that an attachment before judgment could not be made at the instance of a person who had applied for leave to sue as a pauper before his application had been judicially determined in his favour, the learned Judges observed : "Until the Judge has determined whether or not the plaintiff should be permitted to sue as a pauper, there is no suit before the Court ; it is merely an application." In *Skinner* v. *Orde*[4], however, the Privy Council had stated that on the presentation of the petition to sue as a pauper the suit is deemed to have been instituted, and from that it would seem that whether the application is eventually granted or whether the party subsequently pays the necessary court-fee, the suit itself should be considered to have been filed on the presentation of the petition to sue as a pauper. The observation in the Calcutta case did not advert to the view indicated by the Privy Council in *Skinner's case*. As pointed out by Gentle, J., in *Chidambaram* v. *Nataraja Mudaliar*[5] (where the facts were practically the same as in the case under notice), in view of the remarks of the Privy Council in *Skinner's case*, on the presentation of the petition to sue as a pauper the suit should be deemed to have been instituted and as such the parties to the suit will be the persons cited in the copy of the plaint filed along with the petition, and therefore even before the grant of leave in the pauper application it would be competent for the petitioner to apply for the appointment of a commissioner. The conclusion in the case under notice is thus in accord with the observations of the Privy Council and the ruling in the Madras case.

VIRANGAUDA LINGANGAUDA *v.* YELLAPPA SHIDDAPPA, I.L.R. (1943) Bom. 259.

Three rulings of the Privy Council have finally settled that where the rival claimants to the property of a deceased person governed by the Mitakshara law are both atma bandhus, the preference between them falls to be decided by a consideration of the number of degrees by which they are separated from the deceased and not by the principle of spiritual benefit. In *Vedachala* v. *Subramania*[6], where the contest was between the maternal uncle and the father's sister's son's son, in preferring the former, the Privy Council observed : "He (maternal uncle) is

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1. (1911) 21 M.L.J. 1077 : I.L.R. 37 Mad. 38.
2. (1932) 65 M.L.J. 350 : I.L.R. 56 Mad. 879.
3. (1917) 21 C.W.N. 870.
4. (1879) L.R. 6 I.A. 126, 136.
5. (1939) 1 M.L.J. 96 : I.L.R. (1938) Mad. 1060.
6. (1921) 41 M.L.J. 676 : L.R. 48 I.A. 349 : I.L.R. 44 Mad. 753 (P.C.).

undoubtedly nearer in degree to the deceased ; he also offers oblations . . ." In *Jatindranath Roy* v. *Nagendranath Roy*[1], which was a case, not under the Madras school but, under the Benares school of Mitakshara law, in declaring the father's half-sister's son to be the preferential heir as against the mother's brother's son, the Judicial Committee remarked : "Under the Benares school of Hindu law it is now well settled that the primary test in all questions of inheritance is propinquity in blood" . . . . "and the Viramitrodaya brings in the conferring of spiritual benefit as the measure of propinquity where the degree of blood relationship furnishes no certain guide." Finally in *Balasubramanya* v. *Subbayya Thevar*[2], where the rival claimants were the maternal uncle and the father's sister's son (who however was found to be illegitimate) in preferring the former, the Privy Council said : "At first sight it would appear that the question is covered by the direct authority of the Board ; *Jatindranath Roy* v. *Nagendranath Roy*[1]. In that case it was laid down that the test of religious efficacy was applicable between atma bandhus only when the parties were equal in degree." At another place in the same judgment their Lordships said that "it was only when the test of proximity failed that religious efficacy came in." These three rulings make it clear that it is only where the rule of nearness in degree fails that the principle of spiritual benefit could be imported and that the rule is by no means peculiar to any sub-school of the Mitakshara but governs by whatever sub-school the parties are governed: *see* in this connection *Debi Das* v. *Mukat Behari*[3] and *Sahodra* v. *Shri Thakur Beharji Maharaj*[4].

In the instant case, the competing claimants were the mother's brother and the father's sister's son, and the parties were governed by the Bombay sub-school of Mitakshara law. On the principles stated it is clear that the maternal uncle is the nearer heir. A Full Bench decision of the Bombay High Court given in 1925, in *Sakharam Narain* v. *Balakrishna Sadashiv*[5], on identical facts, had however held the other way. The question therefore was whether that decision was to be deemed to have been overruled by the subsequent decision of the Privy Council in *Balasubramanya* v. *Subbayya Thevar*[2]. The Bombay Full Bench decision had proceeded on the view that the method of determining propinquity by calculating the number of degrees from the common ancestor cannot apply to bandhus so effectively as to sagotra sapindas and that though the maternal uncle, taking the common ancestor on the mother's side, may appear one degree nearer than the father's sister's son as taken from the common paternal ancestor, still such method of determining nearness cannot be decisive, where there is not one common ancestor either paternal or maternal for the purpose of determining the relative position of the two bandhus, and that the element of difference between the paternal and the maternal line necessarily comes in casting the preference in favour of the claimant *ex parte paterna.* The argument that the Privy Council decision in *Balasubramanya's case* did not touch the Bombay Full Bench view was rested on the facts that the Full Bench decision had not been noticed by the Privy Council, that the law expounded by the Judicial Committee was the law relating to the Madras school and that the previous decision of the Bombay High Court in *Saguna* v. *Sadhashiv*[6] on which the Full Bench had based its opinion, had come in for express approval by the Privy Council in *Jatindranath Roy* v. *Nagendranath Roy*[1]. It is true that the Bombay Full Bench ruling does not appear to have been cited before their Lordships in *Balasubramanya's case,* but it was criticised and dissented from in the judgment of the High Court which was on appeal before their Lordships. Again, the Privy Council decision was not based on any peculiarity in the Mitakshara law as prevailing in Madras but had merely purported to apply the principles of the Mitakshara and the Viramitrodaya which are leading authorities not merely in southern India, but also in western India. Also, it professed to follow the earlier ruling in *Jatindranath Roy* v.

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1. (1931) 61 M.L.J. 442 : L.R. 58 I.A. 372 : I.L.R. 59 Cal. 576 (P.C.).
2. (1938) 1 M.L.J. 426 : L.R. 65 I.A. 93 : I.L.R. (1938) Mad. 551 (P.C.).
3. I.L.R. (1943) All. 131.
4. I.L.R. (1943) All. 155.
5. (1925) I.L.R. 49 Bom. 739 (F.B.).
6. (1902) I.L.R. 26 Bom. 710.

Nagendranath Roy[1], a case from Bengal where the parties were governed by the Benares school of the Mitakshara law. Nor did the decision rest on any special texts of the Smriti Chandrika or the Sarasvati Vilasa which are authoritative in the Madras school. Nor was there any special text of the Vyavahara Mayukha propounding a contrary rule. Nor could the approval of *Saguna* v. *Sadashiv*[2] in *Jatindra's case* have any significance in view of the fact that in those cases the contestants were in the same degree whereas in the Bombay Full Bench case and *Balasubramanya's case* they were in unequal degree from the decedent. Nor had the Bombay Full Bench case proceeded on any "intelligible underlying principle"; for it had accepted proximity of relationship as the governing principle and not spiritual benefit and *Vedachala's case* had been relied on. The afore-mentioned reasons make it clear that though not specifically overruled the decision of the Full Bench in *Sakharam Narain* v. *Balakrishna Sadashiv*[3] cannot be deemed to be good law after the Privy Council decision in *Balasubramanya's case*.

GORDHANDAS MANGALDAS *v.* THE COMMISSIONER OF INCOME-TAX, BOMBAY, I.L.R. (1943) Bom. 245.

This decision deals with a point of income-tax law. Section 25-A (1) of the Income-tax Act before it was amended in 1939 provided: "Where at the time of making an assessment under section 23, it is claimed by or on behalf of any member of a Hindu family hitherto assessed as undivided that a partition has taken place among the members of the family, the Income-tax Officer shall make such inquiry thereinto as he may think fit, and if he is satisfied that a separation of the members of the family has taken place and that the joint family property has been partitioned among its members in definite portions . . . . he shall record an order to that effect." In the amended sub-section (1) the words "that a separation of the members of the family has taken place and" are omitted, so that the Income-tax Officer instead of having to be satisfied of two things, namely, that a separation of the members had taken place and that the joint family property has been partitioned in definite portions has now to be satisfied of one thing only, namely, that the joint family property has been partitioned among its members in definite portions. The question is whether the Income-tax Officer should be satisfied that the properties have been "physically divided" or merely that there has been a division in interest. The cases on the subject are altogether conflicting. A Full Bench decision of the Lahore High Court, an *obiter dictum* of a learned Judge of the Allahabad High Court, and a ruling of the Judicial Commissioners' Court of Nagpur have taken the view that a physical division is not needed and all that the section requires is only a separation in interest among the members of the erstwhile joint family. As against these authorities, a Division Bench of the Lahore High Court and the Patna, Bombay and Madras High Courts have taken a different view. In *Sir Sunder Singh Majithia* v. *Commissioner of Income-tax, U. P. & C. P.*[4], the object and scope of the section before its amendment was explained by the Privy Council as follows: "Section 25-A is directed to the difficulty which arose when an undivided family had received income in the year of account but was no longer in existence as such at the time of assessment. The difficulty was the more acute by reason of the provision—an important principle of the Act—contained in section 14 (1): 'The tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family.' Section 25-A deals with the difficulty in two ways, which are explained by the rule, applicable to families governed by the Mitakshara, that by a mere claim of partition a division of interest may be effected among coparceners so as to disrupt the family and put an end to all right of succession by survivorship. It is trite law that the filing of a suit for partition may have this effect though it may

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1. (1931) 61 M.L.J. 442 : L.R. 58 I.A. 372 : I.L.R. 59 Cal. 576 (P.C.).
2. (1902) I.L.R. 26 Bom. 710.
3. (1925) I.L.R. 49 Bom. 739 (F.B.).
4. (1942) 2 M.L.J. 761 : I.L.R. (1943) All. 69 (P.C.).

take years before the shares of the various parties are determined or partition made by metes and bounds. Meanwhile the family property will belong to the members as it does in a Dayabhaga family—in effect as tenants-in-common. Section 25-A provides that if it be found that the family property has been partitioned in definite portions, assessment may be made, notwithstanding section 14 (1), on each individual or group in respect of his or its share of the profits made by the undivided family, while holding the members jointly and severally liable for the total tax. If, however, though the joint Hindu family has come to an end it be found that its property has not been partitioned in definite portions, then the family is to be deemed to continue—that is to be an existent Hindu family upon which assessment can be made on its gains of the previous year." That section 25-A controls section 14 (1) if the property has been partitioned in definite portions but not where the family is merely separated in interest coupled with the reference to the distinction between the Mitakshara family and the Dayabhaga family constitute a definite pointer that the partition in " definite portions " contemplated by section 25-A is really a " physical division " of the family property and not a separation in status merely. It is also to be noticed that the retention of the second portion and the omission of the first requirement (namely, that a separation of the members of the family has taken place) in section 25-A by the amendment of 1939 emphasises and is only consistent with the view that it is a physical division of the joint property into definite portions that is contemplated. Again the amended section applies to both Dayabhaga and Mitakshara equally and the section will have no effect at all on families under the Dayabhaga system unless the partition is held to involve a physical division into definite portions. As pointed out by Addison and Sale, JJ., in *Saligram Ramlal* v. *Commissioner of Income-tax, Punjab*[1], even under the unamended section if actual partition had not been contemplated the first requirement of the section would have sufficed and the second would be otiose. *Lachiram Baldeodas* v. *Commissioner of Income-tax, Bihar*[2], holds that a mere notional disruption will not do. The Full Bench decision of the Lahore High Court in *Sher Singh Nathu Ram* v. *Commissioner of Income-tax, Punjab*[3], does not refer to the prior ruling *contra* of the same Court, delivered just about four months earlier. It is difficult to agree with the view of the Full Bench that a partition may involve three stages : (1) disruption without ascertainment of shares as where they are disputed ; (2) disruption with the shares ascertained as where the parties are agreed ; and (3) division by metes and bounds. The conclusion arrived at on that view that what section 25-A requires to be proved may be either the second or the third element has no warrant, for, there can be no such thing as disruption without ascertainment of shares carrying any special status. The distinction between stage 1 and stage 2 is really one concerning the machinery of ascertainment, whether it is to be by litigation or by agreement. Above all, after the definite indication afforded by the ruling of the Privy Council in *Sir Sundar Singh Majithia's case*, the view of the Lahore Full Bench and the *obiter dictum* of Niamatulla, J., in *Biradhmal Lodha* v. *Commissioner of Income-tax*[4], as well as the decision in *Sir Bisesardas Daga and others*, In re[5], which merely follows that *obiter dictum* cannot be regarded as sound. The conclusion reached in the instant case that section 25-A as amended contemplates a physical division of the joint family property in definite portions is in accordance with the Privy Council ruling and has also commended itself to a Bench of the Madras High Court in *Gurumurthi Setti* v. *The Commissioner of Income-tax, Madras*[6].

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1. (1934) 2 I.T.R. 448 : A.I.R. 1934 Lah. 942.
2. (1936) 4 I.T.R. 279.
3. (1934) 2 I.T.R. 479 : A.I.R. 1925 Lah. 81 (F.B.).
4. (1933) 2 I.T.R. 164 : I.L.R. 56 All. 504.
5. (1935) 4 I.T.R. 66.
6. (1944) 1 M.L.J. 197.

Ramu v. Murli Das, I.L.R. (1943) All. 23.

Section 133, Criminal Procedure Code, authorises a magistrate to pass a conditional order for the removal of a public nuisance. Such an order may emanate either on the receipt of a police report or other information and on the taking of such further evidence as the magistrate may think fit. Interesting questions have arisen whether an informant placing information before a magistrate regarding an alleged public nuisance has any *locus standi* in the matter to be heard and whether the magistrate should always pass an order under the section. From very early times it has been recognised that proceedings under the section are not intended to settle private disputes between members of the public, that the Courts should be on guard to see that the section is not utilised as a substitute for litigation in Civil Courts and that a magistrate in case he decides to pass an order under the section will be acting *suo motu* in the matter. Thus In the matter of *the petition of Issur Chunder Nath*[1], the Calcutta High Court laid down that where a magistrate in a proceeding under the section satisfies himself that there is no necessity for proceeding further under the section he can let the matter drop. In *Farzand Ali* v. *Hakim Ali*[2], it was pointed out by the Allahabad High Court that it is certainly expedient that in all proceedings initiated under section 133 the magistrate should bear in mind that he is supposed to be acting purely in the interests of the public and that the complainant has no *locus standi* in the matter once he has performed what was perhaps his duty as a good citizen in calling the attention of the magistrate to the existence of the nuisance. The scope of section 133 was still further clarified in *Sibte Husain* v. *Emperor*[3]. It was there explained that no private person has a right to insist that a magistrate shall pass orders under section 133; that whether such orders should be passed is altogether a matter for the discretion of the magistrate; that if he does not choose to interfere the party aggrieved has his normal remedy in the Civil Court and that the provision that an inquiry should be held is not intended to enable any person complaining of a nuisance to compel the magistrate to hold an inquiry but only to protect the rights of the person against whom it is proposed to pass an order under section 133. The view taken in the case under notice that whenever the magistrate acts under section 133 he in effect acts *suo motu* and that the person who laid the information has no rights in the matter is thus in accord both with the object of the section and the precedents on the subject.

Debi Das v. Mukat Behari Lal, I.L.R. (1943) All. 131; Sahodra v. Shri Thakur Behariji Maharaj, I.L.R. (1943) All. 155.

These are decisions rendered within about a week of each other by two different benches of the Allahabad High Court—Dar and Plowden, JJ., in the one case and Bajpai and Dar, JJ., in the other case—holding that in a competition between bandhus of the same class and in equal degree, the one claiming from the nearer line will be preferred to the one who is claiming from a remoter line. The conclusion may be somewhat commonplace but the reservation made is obviously one of great interest and may have to be finally solved by the Judicial Committee. The reservation was on the question whether a remoter bandhu in a nearer line should be preferred to a nearer bandhu in the remoter line. In the first of the cases the contest was between the sister's son's son and the paternal uncle's son's daughter's son and the former was preferred. In the later case the rival claimants were the sister's daughter's son and the paternal uncle's daughter's son and the former was held to be the preferential heir.

Bandhu succession forms an obscure chapter in Hindu law. The guidance afforded by the shastras is slender; the texts of law are scanty and remote; the field for deduction and speculation is rather wide. The result has been that rules

1. (1882) I.L.R. 8 Cal. 883.
2. (1914) I.L.R. 37 All. 26.
3. A.I.R. 1937 All. 785.

have come to be recognised by some High Courts, with other High Courts dissenting (*e.g.*, Dr. Sarvadhikari's line theory accepted in Allahabad and rejected in Madras) that have not conduced to either simplicity of or clarity in understanding the law on the subject. During the last seventy-five years however, the Judicial Committee has made several pronouncements which have settled some of the controversies which had gathered round this branch of Hindu law. It is thus now settled that atma bandhus take before pitru bandhus and that the latter are to be preferred to the matru bandhus. It is also equally well settled that, where the contestants belong to the same class of bandhus, nearness in degree determines priority between them. It is also fairly clear that, where the claimants are in the same class and degree, spiritual benefit may guide preference. The rulings in *Vedachala* v. *Subramania*[1], *Jatindranath Ray* v. *Nagendranath Ray*[2] and *Balasubramanya* v. *Subbayya*[3] are now conclusive on these matters.

There are however other points arising out of these decisions which still remain to be finally elucidated. One such point is as regards the manner in which nearness in degree is to be ascertained. Is it to be done by a mere counting of the links separating the deceased from the respective claimants ? This is no doubt the method of calculation adopted by the Indian Succession Act and in the Canon law. But does it operate in Hindu law ? Or is it that in the first instance the relative proximity of the lines in which the contesting claimants are situated should be ascertained and that it is only where the lines are equally remote that the degree in which each claimant stands with reference to his common ancestor would become relevant for determining preference ? In *Vedachala* v. *Subramania*[1], where the contest was between the maternal uncle and the father's sister's son's son, the Privy Council remarked : " What is the place of the mother's brother among the atma bandhus ? He is not specifically named ; his sons are. He is *unquestionably the nearest sapinda.*" To read the italicised part literally will be impermissible, as to do so may lead to strange results. For one thing it would suggest that the maternal uncle is nearer than even the maternal grandfather, or one's son's daughter's son or sister's son, a position that has not so far received any countenance. Also the later observations of the Privy Council in the same para. would seem to indicate that in the context the remark in question fell to be made only *vis a vis* the other claimant in the case, the father's sister's son's son, who certainly was equal in line with the maternal uncle from the propositus though unequally placed as regards degree. Whether however proximity in degree is to be reckoned by the number of links separating the respective claimants from the decedent irrespective of any reference to the lines in which they are posited is a matter about which there is no lead in the judgment. In the particular case, in whatever way calculated, the maternal uncle will be nearer in degree than the father's sister's son's son. Computing from the deceased in a reel he is in the fourth degree, there being two links intermediate between him and the propositus ; worked out that way the other claimant will be in the sixth degree, there being four links intervening between him and the deceased. Making the calculations with reference to their respective lines, then also the result will be the same ; the respective claimants will be in equal line, one being in the line of the maternal grandfather and the other in that of the paternal grandfather ; from the common ancestor however the maternal uncle is in the second degree whereas the father's sister's son's son is in the fourth degree. In *Jatindranath Ray* v. *Nagendranath Ray*[2], where the contest was between the father's half-sister's son and the mother's sister's son, it was observed : " It is not disputed that the opposing parties are in equal degrees of propinquity to the propositus." This is quite consistent with nearness being ascertained either absolutely by counting from the deceased or by advertence to the lines in which the respective claimants are situated in the first instance, and the proximity of degree from the common

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1. (1921) 41 M.L.J. 676 : L.R. 48 I.A. 349 : I.L.R. 59 Cal. 576 (P.C.). I.L.R. 44 Mad. 753 (P.C.).
2. (1931) 61 M.L.J. 442 : L.R. 58 I.A. 372 : I.L.R. 59 Cal. 576 (P.C.).
3. (1938) 1 M.L.J. 426 : L.R. 65 I.A. 93 : I.L.R. (1938) Mad. 551 (P.C.).

ancestor being invoked to decide preference thereafter, the lines themselves being equal. Likewise in *Balasubramanya* v. *Subbayya*[1], where the rival claimants were the maternal uncle and the father's sister's son, the Privy Council observed : "As between claimants 2 and 3 Subbayya as nearer in degree to the last male holder is entitled to succeed to the estate." This remark also does not carry the matter any further, for the result will be the same whether proximity of degree was judged with reference to the propositus himself directly or after reference to the nearness of the line. The decision of the Judicial Committee in *Ramachandra Martand* v. *Vinayek Venkatesh Kothekar*[2], that for purposes of heritability sapinda relationship will have to be taken in the same sense in which it is used and understood in regard to the marriage rules, would afford a pointer that proximity of degree will have to be ascertained by a reference in the first instance to the common ancestor and his line and not by ignoring that factor. The approach to the question in the instant cases that in determining the question of equality or otherwise of the degree it is the position from the common ancestor of each claimant that should be adverted to and not the position with reference to the propositus himself directly thus seems to constitute a correct appreciation of the position.

The question however remains whether relative nearness to the common ancestor is to operate as a ground of preference only where the lines of the claimants are equal or whether if a claimant is in a nearer line that will in every case give him the preference, however close the other claimant may be to the common ancestor who himself is remoter. On this point, there is no unanimity of judicial opinion. In *Muthusami* v. *Muthukumarasami*[3], Muttuswami Ayyar, J., observed : "Though sons born in the family are all gotrajas, yet the Mitakshara regulates the succession when there is competition between them with reference to the nearness or remoteness of propinquity, as, for instance, between a brother and a paternal uncle's son. It is not clear why this analogy should be ignored in the case of daughters born in the family and why the father's sister and the grandfather's sister should be treated as related to the propositus in the same degree of affinity. Nor is it reasonable to regard one's own sister's son and one's grandfather's sister's son as related in the same degree." This would suggest that the nearer line should be preferred to the more remote in bandhu succession as in the case of gotraja succession. No warrant however is afforded for the argument that the nearer line should always prevail over the remoter without any qualification. A number of decisions in Madras and a ruling of the Bombay High Court have expressed themselves in favour of such a rule. Thus in *Baluswami Pandithar* v. *Narayana Rau*[4], the principle was applied preferring the sister's son's son to the maternal uncle's son. The former is in the fourth degree from the common ancestor and the latter is in the third degree ; yet the former was held to be the preferential heir because he belonged to a nearer line. In *Krishna Ayyangar* v. *Venkatarama Ayyangar*[5], the father's sister's daughter's son was preferred to the father's father's sister's son. This is as it should be, for the former is an atma bandhu and the latter is only a pitru bandhu. The learned Judges however emphasised the fact that the defendant was of "*the nearer line and therefore*" entitled to inherit. In *Kalimuthu Pillai* v. *Ammamuthu Pillai*[6], in preferring the daughter's daughter's son to the sister's son stress was laid on the principle that in each class of bandhus "the nearer in line excludes the more remote." The ruling in *Dattatraya Bhimrao* v. *Gangabai*[7] has also taken a similar view. In *Sham Dei* v. *Birbhadra Prasad*[8], the rival claimants were the sister's daughter's son and the paternal grandfather's daughter's son's son. The latter was preferred. The conclusion seems to have no legal warrant and is difficult to follow. Both the

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1. (1938) 1 M.L.J. 426 : L.R. 65 I.A. 93 : I.L.R. (1938) Mad. 551 (P.C.).
2. (1914) 27 M.L.J. 333 : L.R. 41 I.A. 290 : I.L.R. 42 Cal. 384 (P.C.).
3. (1892) 2 M.L.J. 296 : I.L.R. 16 Mad. 23, 29.
4. (1887) 7 M.L.J. 207 : I.L.R. 20 Mad. 342.
5. (1905) I.L.R. 29 Mad. 115.
6. (1934) 67 M.L.J. 503 : I.L.R. 58 Mad. 238.
7. (1921) I.L.R. 46 Bom. 541.
8. (1921) I.L.R. 43 All. 463.

claimants were atma bandhus ; the sister's daughter's son admittedly belonged to a nearer line ; reckoning nearness from the common ancestor he is in the fourth degree the other claimant not being nearer ; even computing proximity by looking to the number of links between the claimants and the deceased there are three links only between the sister's daughter's son and the deceased while there are four in the case of the other claimant. So on any reading of the test of proximity the result reached in the case seems to be unsupportable.

Perhaps the most formidable criticism against the view that every heritable bandhu belonging to a nearer line should be preferred to one in a remoter line however close the latter may be to the common ancestor is to be found in the judgment in *Umashankar Prasad Parasari* v. *Mt. Nageswari Koer*[1], where by a majority opinion of three judges to two, it was held that as between the maternal uncle and the sister's daughter's son the former would be the preferential heir. On a rigorous application of the rule that the nearer line should be preferred, the conclusion should have been the other way. In the course of his judgment one of the majority Judges, Mullick, J., observed : " But then it is said that the rule of the Mitakshara is that the nearer line excludes the more remote and therefore the line of the father of which the plaintiff is a member must be exhausted before the line of the maternal grandfather can come in. Now this rule is not based on any text. It is derived from the order of succession as given in the Mitakshara relating to certain named agnates, but even in that connection the rule is not of general and universal application. In the earlier decisions in Upper India the limit was placed . . . at the seventh lineal descendant ; according to later decisions in Madras it was fixed at the second degree ; while their Lordships of the Privy Council have now definitely held that the limit of collateral descent is three degrees in each line . . . . If therefore the rule is limited in application with regard to agnates I see no reason why it should be applied without restraint and restriction in the case of cognates." No doubt this Patna decision is earlier than the Privy Council rulings in *Vedachala's case* and other subsequent decisions which have established that among rival claimants from the same class of bandhus nearness in degree to the propositus will determine preference and that so long as that principle can give a clear lead there is no room for invoking the principle of spiritual benefit or any other rule. The difficulty really arises in the application of the degree rule, whether it is to operate in all cases irrespective of every other consideration and how it is to be correlated to the rule of preference of the nearer line. In the circumstances it will be welcome if the Judicial Committee can clarify the position and impart certainty in the law to be applied.

EMPEROR *v.* NAROTAM DAS, I.L.R. (1943) All. 186.

In this case the Allahabad High Court observed : " It is a matter of opinion whether a Court should or should not take notice of gratuitously insulting remarks contained in an application for adjournment and I am by no means satisfied that it is wise to press the principle of taking no notice too far." With great respect it may be submitted that except where the insult is deliberately intended or calculatedly made a Court should decline to take notice of improper remarks, which more often than not are made as the result of petulance, foolishness or thoughtlessness. In the case in question in an application requesting postponement of trial to enable the applicant to move for a transfer of the case to some other Court, there was a statement that the applicant was making the application because the Court had for some unknown reason become hostile to him. It is true that the allegation was obviously unnecessary in the motion for adjournment. To infer therefrom however an intention to insult the Court does not seem to be warranted. In *Queen-Empress* v. *Abdullah Khan*[2], where, in an application for transfer of a case, certain objectionable allegations had been made against the trying magistrate, Burkitt, J., reversing the

1. (1918) 3 P.L.J. 663 : 48 I.C. 625 (F.B.). 2. (1898) 18 A.W.N. 145.

decision of the Court below held that no intention to insult the Court should be inferred from the allegations, their ostensible object being just to procure a transfer of the case. Curiously enough the application for transfer was made to the trying magistrate himself who however had no power to order the transfer and it might very well have been argued that the presentation of the application with the objectionable remarks to the magistrate had been made only with a view to insult him; such a contention did not however appeal to Burkitt, J. In *Emperor* v. *Murli Dhar*[1], as in the instant case, in an application for adjournment of the trial with a view to apply for a transfer of the case, the accused inserted the allegation that the magistrate was friendly with the complainants and therefore they had apprehension that they would not get a fair trial before him. Obviously the allegation was entirely unnecessary in the application for adjournment; nevertheless Piggot, J., refused to read it as a gratuitous insult addressed to the Court. In reversing the Sessions Judge, the learned Judge remarked: "The question is whether it follows from the wording of the petition that the intention of the persons presenting the same was to offer insult to the presiding officer of the Court" and held that the allegation did not embody any such intention. As pointed out by Moti Sagar, J., in *Parshotam Lal* v. *Crown*[2], the chief ingredient of the offence contemplated by section 228, Indian Penal Code, is the intention of the offender and the question is not whether a judicial officer felt insulted but whether an insult was actually offered and intended. The learned Judge added that "a judicial officer is no doubt fully entitled to maintain the dignity of the Court but he should not be too sensitive and too ready to take offence where none is intended." In *Salig Ram* v. *Emperor*[3], in an application for adjournment by an accused to enable him to make an application to the High Court under section 526, Criminal Procedure Code, he stated: "The applicant notices with regret that the Court is completely in the hands of the prosecution and is unable to show any mercy, favour or kindness to the innocent accused person. The applicant has completely lost all faith. The applicant apprehends that the Hon'ble Court is unable to administer justice in this case impartially". The applicant was convicted under section 228, Indian Penal Code. On the application for transfer of the case coming up before him, Iqbal Ahmed, J., observed *apropos* of the allegations in the application for adjournment: "I must observe that the learned Judge would have shown judicial balance by not taking notice of the passages . . . . and by not taking proceedings under section 228, Indian Penal Code." Whether in any case the allegations in question were made with a view to insult will no doubt remain essentially a question of fact; but to state that it may not be wise to press the principle of taking no notice too far seems to indicate an outlook more rigid than necessary.

PATRU LAL *v.* PARBHAWATI KUAR, I.L.R. (1943) All. 205.

It is observed *inter alia* in this case that "the separation of the coparceners that form a joint Hindu family can only be brought about by individual volition" and that "it is only a member of a joint Hindu family who can separate and neither a Court nor a third party can separate him against his wishes." It is submitted that unless qualified, the statement as a proposition of law would be inaccurate. It is undisputed law that a person can sometimes be severed from the joint family of which he is a member independently of his wishes, as for instance, by the father or paternal grandfather imposing a partition in the family. It is also equally indisputable that irrespective of one's actual wishes, one would by operation of law altogether stand severed from the coparcenary of which he was a unit in case he became a convert to an alien faith like Christianity or Muhammadanism, or if he contracted a marriage under the Special Marriage Act, 1872, as amended in 1923. It is no doubt true that originally partition was held to result from an intention to separate only. It was the right of the coparcener to call for a partition if he was so

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1. (1916) I.L.R. 38 All. 284.
2. A.I.R. 1925 Lah. 210.
3. A.I.R. 1937 All. 171.

minded. By making a unilateral declaration of an unequivocal intention to become divided in *presenti* from the other members of the family, a severance in status so far as the declarant was concerned could be achieved. Should such intention be actual, that is factually exist, or can it be constructive? It is here that judicial decisions re-acting to the remorseless logic of the law have made inroads into the pristine doctrine and recognised a constructive intention to separate under certain circumstances, such as in the case of conversion of the Hindu coparcener to a foreign faith.

In certain other cases severance of status as a coparcener on foot of a constructive intention seems to be suggested though not in terms so stated. It has been held that the attachment of a coparcener's share in execution by a creditor arrests the operation of survivorship against such share in case of the coparcener's death (see *Suraj Bansi* v. *Sheo Pershad*[1]) and causes a severance (see *Madho Pershad* v. *Mehrban*[2]). It is also held that when the estate of a coparcener has vested in the Official Assignee or Receiver on his insolvency that estate would continue after his death and would not be defeated by survivorship, *Fakirchand* v. *Motichand*[3] and *Gori Shankar* v. *Official Receiver*[4]. If attachment by Court in execution or vesting in the Assignee on insolvency of the coparcener has the effect of withdrawing the coparcener's share from the range of survivorship at his death, is it unreasonable to construe it as being tantamount to a severance in status of the coparcener concerned so as at any rate to prevent the other members of the family from having any rights in respect of his share or, *vice versa*?

Another point of interest about the case under notice is the rejection of the contention that a sale of the entire interest of the coparcener in the family properties would operate as a severance in status so far as he is concerned. The conclusion is no doubt in accord with the view generally taken by the Courts on this question, see *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*[5], *Subba Rao* v. *Ananatanarayana Ayyar*[6], *Nanjayya* v. *Shanmugha*[7], *Maharajah of Bobbili* v. *Venkataramanjulu*[8], *Kandasami Udayan* v. *Velayudha Udayan*[9], *Jagannatha Rao* v. *Ramanna*[10], *Ramasubbaraya Sastri* v. *Venkata Appalanarasimharaju*[11] and *Gurulingappa* v. *Nandappa*[12]. It may however be pointed out that a conclusion the other way would be more in consonance with modern trends in joint family law. Alienation by a coparcener of his share is not contemplated by the texts of Hindu law. A coparcener has in fact no share to speak of till he calls for partition, *Appovier* v. *Ramasubbier*[13]. The position came to be altered when recognition was accorded on grounds of equity to the rights of a purchaser for value from a coparcener in Madras and Bombay of what would be his share on a partition and to attachment in execution of a coparcener's share and sale thereon as passing a good title to the purchaser, *Suraj Bansi* v. *Sheo Pershad*[1]. The latter case itself recognised that "there can be little doubt that all such alienations whether voluntary or compulsory are inconsistent with the strict theory of a joint and undivided Hindu family." Nevertheless it was considered paramount to protect the rights of purchasers from coparceners. The first plunge being made, decisions had, by way of working out the rights of the purchaser, to hold logically that where a coparcener's share stood alienated the alienee would become entitled to "the share" which the alienor would have got had a partition been effected immediately before the sale, *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya*[5]. It is, as if in effect the sale operated as a partition at the time, *Hardi Narain Sahu* v. *Ruder Perkash Misser*[14]. If the alienee's interest is fixed with reference to the date of the alienation and if subsequent happenings in the family will leave that interest unaffected

1. (1878) L.R. 6 I.A. 88 : I.L.R. 5 Cal. 148 (P.C.).
2. (1891) L.R. 17 I.A. 194 : I.L.R. 18 Cal. 157 (P.C.).
3. (1883) I.L.R. 7 Bom. 438.
4. (1932) I.L.R. 13 Lah. 464.
5. (1902) I.L.R. 25 Mad. 690, 717 (F.B.).
6. (1912) 23 M.L.J. 64.
7. (1914) 26 M.L.J. 576: I.L.R. 38 Mad. 684.
8. (1914) 27 M.L.J. 409, 413: I.L.R. 39 Mad. 265.
9. (1926) 51 M.L.J. 99, 104.
10. (1937) 2 M.L.J. 386.
11. (1940) 2 M.L.J. 1021.
12. (1896) I.L.R. 21 Bom. 797, 802.
13. (1866) 11 M.I.A. 89 (P.C.).
14. (1883) L.R. 11 I.A. 26 : I.L.R. 10 Cal. 626, 636 (P.C.).

and if the attachment of a coparcener's interest in execution takes it beyond the reach of survivorship should the coparcener die, does not the inference become inevitable that on alienation of his share by a coparcener there is a severance of the alienor from the joint family? According to Sadasiva Ayyar, J., in *Soundararajan* v. *Saravana Pillai*[1], where a coparcener sells away his share in all the coparcenary properties without exception he ceases to be a member of the family and a division in status takes place. If an unequivocally expressed intention to create a divided status effects division, the alienation of his interest by a coparcener in all the joint family properties in favour of a stranger seems to be almost conclusive evidence of such an intention to break himself off from the joint status completely, see also *Chinnu Pillai* v. *Kalimuthu Chetti*[2] and *Lakshmi Achi* v. *Narayanaswami Naicker*[3]. This reasoning receives support from certain observations made by the Judicial Committee in *Ram Chunder Dutt* v. *Chander Coomar Mundul*[4], where it was said: "It is true that the status of the family as a joint Hindu family was not continuing. The alienation of the shares of two members of that family determined that status and substituted the status of co-sharers or joint owners whose rights as is shown by Lord Westbury in the case of *Appovier* v. *Ramasubbier*[5] are in many important respects distinguishable from those of a joint and undivided family." The arguments against construing an alienation of even the entire share of the coparcener as a severance in status of the alienor are: (*i*) alienation is not tantamount to the expression of an intention to divide, *Jagannadha Rao* v. *Ramanna*[6]; (*ii*) the purchaser gets only an equity and is not substituted for the alienor, *Gurulingappa* v. *Nandappa*[7]; and (*iii*) severance can only be by a mode known to and recognised by Hindu law, *Lakshmanan Chettiar* v. *Srinivasa Iyengar*[8]. The first argument can now have little force. As indicated *supra* both decisions and statute have recognised that intention to sever may be constructive. If alienation of a coparcener's interest is destructive of the fundamental theory of a joint family under the Mitakshara law, he who deliberately alienates his share cannot but be deemed thereby to detach himself from the family. Again there should be reciprocity of rights among the members of the family *inter se*. To alienate taking benefit thereunder and yet continue as a coparcener will be to give a weightage to or confer a premium at law on one who has rebelled against the integrity of the joint family. Nor can it be sound answer to say that if the other members of the family are not prepared to have the alienor with them in the family the remedy lies in their hands, namely, to become separated from him. The second of the arguments also is scarcely formidable. The purchaser's right though referred to as an "equity" is in effect a right available to him to sue for a general partition with the share being fixed as on the date of the alienation in his favour. The last argument overlooks the fact that severance in modes not contemplated by Hindu law has now come to be recognised having regard to the exigencies of the case, as in the case of conversion. Having regard to the importance of the question it is desirable that the matter is finally set at rest by an authoritative pronouncement.

PARAS RAM SINGH *v.* RAJA MOHAN MANUCHA, (1944) 1 M.L.J. 282 (P.C.).

This decision of the Judicial Committee affirming the judgment of the Allahabad High Court deals with interesting points relating to a mortgage by deposit of title deeds made at Delhi, a place to which the provisions of the Transfer of Property Act do not apply. The decision no doubt turned mainly upon the findings of fact in the case but is not without interest as recalling certain principles relating to equitable mortgages. Along with a promissory note, the title deed relating to a

1. (1916) 30 M.L.J. 592.
2. (1910) 21 M.L.J. 246: I.L.R. 35 Mad. 47, 59 (F.B.).
3. (1929) 57 M.L.J. 746: I.L.R. 53 Mad. 188.
4. (1869) 13 M.I.A. 181, 198 (P.C.).
5. (1866) 11 M.I.A. 89 (P.C.).
6. (1937) 2 M.L.J. 386.
7. (1896) I.L.R. 21 Bom. 79.
8. (1936) 71 M.L.J. 707: I.L.R. (1937) Mad. 203.

certain property had been handed over in pursuance of an understanding between the parties, to the creditor's brother-in-law who was acting as his agent in the matter, the promissory note and the title deed being subsequently sent on to the creditor by the agent with a covering letter mentioning that the title deed had been handed over as "additional and collateral security" for the promissory note. That a mortgage by deposit of title deeds could be validly created in Delhi was not disputed. Whether the title deed was deposited with the intention to create a security was a point argued resulting in the finding that the deposit was made with intention to create a security. Their Lordships also held that the letter written to the creditor by his agent at Delhi, his brother-in-law, could not be regarded as itself constituting the agreement between the lender and the borrower and so no question of the letter requiring registration for its being admissible in evidence could arise. In *Shaw* v. *Foster*[1], Lord Cairns observed that it was a well-established rule of equity that a deposit of a document of title without more would create a charge, but if the deposit was accompanied with a written charge the terms of the latter will rule. In *Pranjivandas Jagjivandas Mehta* v. *Chan Ma Phee*[2], the Privy Council laid down that when the bargain is a written bargain, it alone must determine the scope of the security. Applying these principles, Lord Carson propounded in *Subramanian* v. *Lutchman*[3] the test: "*Did the document constitute the bargain between the parties or was it merely the record of an already completed transaction?* Amplifying this statement, it was stated by the Privy Council, in *Sundaracharíar* v. *Narayana Aiyar*[4]: "While their Lordships do not think that the language of Lord Carson conveys or was intended to convey the meaning that no memorandum relating to a deposit of title deeds can be within section 17 of the Registration Act, unless it embodies all the particulars of the transaction of which the deposit forms part, their Lordships are of opinion that no such memorandum can be within the section *unless on its face it embodies such terms* and is signed and delivered at such time and place and in such circumstances as to lead legitimately to the conclusion that, so far as the deposit is concerned, it constitutes the agreement between the parties." Thus it is only where the written bargain is tacitly considered by the parties themselves as the only repositary and evidence of the agreement that registration will be needed and if the note is only a recital of an already completed transaction it does not require registration. On the finding in the instant case that the letter written by the creditor's brother-in-law to him cannot be regarded as itself constituting or embodying the agreement between the borrower and the lender, it follows in accordance with the authorities set out *supra* that no question of need for its registration can possibly arise.

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1. (1872) 5 H.L. 321, 340.
2. (1916) 31 M.L.J. 155 : L.R. 43 I.A. 122 : I.L.R. 43 Cal. 895 (P.C.).
3. (1922) 44 M.L.J. 602 : L.R. 50 I.A. 77 : I.L.R. 50 Cal. 338 (P.C.).
4. (1931) 60 M.L.J. 506 : L.R 58 I.A. 68 ; I.L.R. 54 Mad. 257 (P.C.).

KING EMPEROR *v.* BANOMALI MAHARANA, (1943) I.L.R. 22 Pat. 48.

An interesting point of criminal law was decided in this case which holds that the legislature in framing section 153-A, Indian Penal Code never contemplated that it should be used with reference to particular small groups of people and that the "classes" contemplated under the section must be not only "clearly defined and separable but also numerous." Section 153-A makes it an offence to promote or attempt to promote "feelings of enmity or hatred between different classes of His Majesty's subjects". The word "classes" in section 153-A has not been defined anywhere. In *Vishambar Dayal Tripathi* v. *Emperor*,[1] it was pointed out that any definite and ascertainable class will come within the section though the classes may not be divided on any racial or religious tests. On this test, it has been held that "capitalists" are not a class within the meaning of the section, *ibid.*, see also *Nepal Chandra Bhattacharya* v. *Emperor*,[2] *Maniben Kara* v. *Emperor*.[3] Likewise it has been held that a joint stock company is not a "class" of His Majesty's subjects for purposes of section 153-A or its shareholders as distinct from the labourers or employees, *Thakin Lay Maung* v. *The King*[4]. On the other hand the view has been expressed that the police as a whole may be deemed to be a "class," *Zamindar Newspaper, In the matter of*.[5] Similarly for the purposes of section 4 (1) (*d*) of the Press (Emergency Powers) Act, 1931, the "rich" more particularly described in the pamphlet forming the subject matter of complaint in the particular case, as "zemindars, mill-owners and land-owners", were held to form a sufficiently ascertained "class" for the purposes of the section, *Ramalingayya* v. *Emperor*.[6] In coming to that conclusion the Madras High Court followed a ruling of the Allahabad High Court in *Ram Saran Das Johri* v. *Emperor*,[7] where it had been held that the reference in a pamphlet to the "rich persons" as zamindars, bankers and petty shop-keepers, as contrasted with kisans was sufficiently well-defined for the purpose of section 16 of the Press (Emergency Powers) Act, 1931, as amended by the Criminal Law Amendment Act, 1932. It may, with respect, be pointed out that to interpret the word "class" in section 153-A of the Penal Code so as to take in the rich merely because the latter term was more particularly or fully described as comprising the zemindars, bankers and land-owners is to give the term a liberal instead of a strict interpretation, which is inconsistent with the principle that penal statutes should be construed strictly. It may also be noted that a different interpretation has been favoured in certain other decisions. Thus in *Kamal Sircar* v. *Emperor*[8], Biswas, J., held that the word "class" meant only a definitely ascertainable body of individuals having clearly defined and non-variable characteristics by which it may be distinguished from any other group, and that "capitalists" as such any more than literates or illiterates or the rich or the poor will not be a "class" within the meaning of section 4 (1) (*d*) of the Press (Emergency Powers) Act. Similarly in *Badri Narain* v. *Chief Secretary to the Government of Behar*,[9] it was held that the words "masters or exploiters" were too wide to denote a definite or ascertainable class.

The precise scope of the term "classes" in section 153-A, Penal Code has been examined in two decisions of the Bombay High Court, *Maniben Kara* v. *Emperor*[3] and *Vasudev Phadke* v. *Emperor*[10]. In the first of these cases it is pointed out that a "class" within the meaning of section 153-A should be characterised by three elements: (*i*) it should be well-defined and ascertained; (*ii*) there should be an element of permanence or stability about it; and (*iii*) it must be sufficiently widespread and numerous. In the later case, the Bombay High

1. (1940) 190 I.C. 887.
2. I.L.R. (1939) 1 Cal. 299.
3. (1932) I.L.R. 57 Bom. 253.
4. 1939 Rang. L.R. 239.
5. A.I.R. 1934 Lah. 219.
6. (1936) 71 M.L.J. 357: I.L.R. (1937) Mad. 141.
7. A.I.R. 1934 All. 717.
8. I.L.R. (1938) 1 Cal. 455.
9. A.I.R. 1941 Pat. 132.
10. (1940) 42 Bom.L.R. 861: A.I.R. 1940 Bom. 379.

Court went further. Beaumont, C.J., observed: "I think to bring any body of persons within the description of a "class" of His Majesty's subjects within the meaning of section 153-A, the body of persons must possess a certain degree of importance numerically. One cannot say that every group of persons is properly designated a class of His Majesty's subjects. For example, I should say that any one who attempted to promote feelings of enmity between members of the Appellate Side Bar and members of the Original Side Bar could not be said to be infringing section 153-A, because I should say that the two sides of the Bar in a particular Court could not be designated as "classes" of His Majesty's subjects; they are mere groups". Wassoodew, J., in his judgment elaborated the position and suggested yet another element as a pre-requisite for a group being reckoned as a "class". The learned Judge remarked: "In my opinion, the expression "classes of His Majesty's subjects" in section 153-A of the Code is used in a restrictive sense as denoting a collection of individuals or groups bearing a common and exclusive designation and also common and exclusive characteristics which may be associated with their origin, race or religion, and that the term 'class' within the section carries with it the idea of numerical strength so large as could be grouped within a single, homogeneous community. . . . . It is true that in the development of citizenship a sharp distinction has arisen between one group of citizens and another based on purely materialistic or economic conceptions. For instance, the functional group, according to the economic theory, would be capable of being sub-divided into numerous smaller groups, each being described as a class in itself. The functional group might include the priestly class, the workers and the artisan class. Society could also be grouped according to the economic theory into the propertied class, the capitalistic class, like the sowcars, and the rentier class which live on the income of the property and the labour class. That was not, in my opinion, what was contemplated by the framers of section 153-A of the Code. None of these groups can claim both exclusive and common characteristics which could be readily ascertained, and, which, I think, constitute the essential quality of the class mentioned in section 153-A, Indian Penal Code". The antithesis between Dives and Lazarus, between "haves" and "have-nots" is as old as the world and there is every justification for the statement that the word 'classes' must be understood not with reference to economic or materialistic distinctions, but with reference to racial, cultural, religious, linguistic and such like distinctions only.

ABDUL RAHMAN v. VILAYAT HUSSAIN, (1943) I.L.R. 22 Pat. 74.

This case has laid down that an insolvency court has inherent power like other civil courts to correct its own mistakes and to pass appropriate orders. In the case under notice, the question arose with reference to the setting aside of an order passed *ex parte* in favour of the surety of an insolvent who had been compelled to pay the creditor of the insolvent, permitting him to sue the insolvent for recovery of the amount. In England, section 108 (1) of the Bankruptcy Act of 1914 (corresponding to section 104 of the Bankruptcy Act of 1883) enacts that every court having jurisdiction in bankruptcy under that Act may review, rescind, or vary any order made by it under its bankruptcy jurisdiction. Even before any statutory provision was made in this respect, the English Bankruptcy Courts were exercising the power of review as an *inherent power*, see *Ex parte Roppey,*[1] *Ex parte Atherton*[2]. In India, section 8 (1) of the Presidency Towns Insolvency Act enacts: "The Court may review, rescind or vary any order made by it under its insolvency jurisdiction". As regards however the Provincial Insolvency Act of 1907 and the later Act of 1920 the legislature did not confer any such power by express enactment. The question therefore fell to be considered whether such power

1. (1815) 19 Ves. 468: 34 E.R. 590. 2. (1868) L.R. 3 Ch. App. 142.

existed as an inherent power or may be inferred from the general powers contained in section 5 which stated: "Subject to the provisions of this Act the Court in regard to the proceedings under the Act, shall have the same powers and shall follow the same procedure as it has and follows in the exercise of its original jurisdiction". The result has been, in the words of a learned author, "a labyrinth of case-law on the interpretation of this section with reference to the power of review of insolvency courts". An argument against the existence of the power in the case of the mofussil Courts founded upon the difference in the provisions of the Presidency and the Provincial Acts was met in *Ayyasami Chetti* v. *Official Receiver*[1] thus: "The Civil Procedure Code, as such, does not apply to the proceedings before the original side of the High Court, whereas the Civil Procedure Code as such is made applicable under section 5 of the Provincial Insolvency Act to proceedings before the mofussil courts. That probably is the reason why we have not got any such specific provision in the Provincial Insolvency Act corresponding to section 8 (1) that occurs in the Presidency Towns Insolvency Act". On the question whether section 5 will enable the insolvency court to "review, rescind or vary its orders", in *Venugopalachariar* v. *Chunni Lal Sowcar*,[2] it was held that no such power would be available at any rate wherever there was an express remedy provided in the Act in regard to any matter, stress being laid on the opening words of the section "subject to the provisions of this Act". An earlier decision of that Court had however taken a broader view in *Abbi Reddi* v. *Venkata Reddi*,[3] where it was stated: "The Court exercising ordinary original jurisdiction has power to review its orders. There is no warrant for the proposition that a civil court cannot correct its own orders or cannot modify any order which it has passed when it finds that the order is patently wrong . . . . . . When an insolvency court has the same powers and follows the same procedure as a civil court exercising ordinary original civil jurisdiction, it cannot reasonably be contended that the power to review has been taken away. Under the English Bankruptcy Act the power to review is specifically given. Such provision is not specifically enacted in the Provincial Insolvency Act as the insolvency court is invested with jurisdiction which an ordinary civil court has in the exercise of its original jurisdiction". See also *Official Receiver* v. *Nataraja Sastrigal*[4], *Govinda Rao* v. *Official Receiver, Trichinopoly*[5], *Ayyasami Chetty v. Official Receiver, Coimbatore*[1]. In *Mannu Lal* v. *Kunj Behari Lal*[6], the Allahabad High Court has taken a similar view and in *Balla Mal* v. *Mussamat Fatima Bibi*[7], Tek Chand, J., observed: "I have . . . . . no doubt that the legislature has recognised the existence of inherent powers in insolvency courts to pass appropriate orders in the same manner and to the same extent as civil courts" The Lahore decision recognises the powers as an inherent power of the Court itself and in Calcutta also that view has found favour. Thus in *Sarat Kumar Ray* v. *Nabin Chandra Ram Chandra Shaha*[8], Rankin, C.J., remarked "Where an *ex parte* order is passed in insolvency proceedings the person affected may bring the matter to the notice of the Court and it is always open to it to undo the order on the ground that the original order was made on insufficient materials or that for other reasons it should not have been made". The conclusion in the case under notice that the insolvency court has power to set aside an *ex parte* order passed by it earlier on the ground of mistake is thus in accord with the general consensus of judicial opinion, though there might be some difference as to the proper basis of the power, whether it is inherent in the Court itself to enable it to do justice or whether it flows out of section 5 of the Provincial Insolvency Act.

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1. (1931) 61 M.L.J. 719.
2. (1926) 51 M.L.J. 209: I.L.R. 49 Mad. 935.
3. (1926) 51 M.L.J. 60.
4. (1923) 44 M.L.J. 251: I.L.R. 46 Mad. 405.
5. A.I.R. 1927 Mad. 897.
6. (1922) I.L.R. 44 All. 605.
7. (1934) I.L.R. 15 Lah. 698.
8. (1928) I.L.R. 56 Cal. 667 (F.B.).

SRIMATI MANI DEVI *v.* SRIMATI ANPURNA DAI SIJUARIN, (1943) I.L.R. 22 Pat. 114.

This case decides *inter alia* that an assignment of a surety bond by an order of Court need not be made by an instrument in writing and that the provisions of section 130 of the Transfer of Property Act do not apply to such a transfer. A claim under a surety bond is no doubt an actionable claim and under section 130 the transfer of an actionable claim can be made only by an instrument in writing. Section 2 (*d*) however in terms provides that the provisions of the Transfer of Property Act shall not apply to any transfer made in execution of a decree or order of a Court of competent jurisdiction. The only question that may then arise is whether section 2 (*d*) stands controlled or controls section 130. The very wording of the former provision indicates that its operation is paramount unless expressly otherwise stated. Thus while it is stated that section 2 (*d*) cannot affect anything in chapter IV, there is no similar reservation made in regard to section 130 which occurs in chapter VIII. In *Palaniappa Tevan* v. *Shadagopa*,[1] it was held that section 135 cannot apply to execution sales by reason of section 2 (*d*). *Ram Saran Das* v. *Yudhishatar Prasad*,[2] is a direct authority in regard to the scope of section 130. There it was held that where a Court had obtained a security bond hypothecating immovable property to secure a proper disposal of the money due to minors deposited with it, an assignment of the security bond in favour of the minors on their attaining majority to enable them to realise the money from the surety can be made merely by an order of the Court without any registered deed of transfer. The conclusion in the instant case is thus in accord both with statute and authority.

RAI SAHEB DR. R. P. GHOSH *v.* THE BENGAL AND NORTH WESTERN RAILWAY COMPANY, LTD., (1943) I.L.R. 22 Pat. 154.

The nature and extent of the duty owed by a railway company towards persons resorting to its stations and yards in the ordinary course of business in regard to the maintenance and upkeep of the premises and yards is a matter of more than passing interest from the point of view of the general public. In the above case it is pointed out that the duty of the railway company in this matter is similar to that of the occupier of private premises towards invitees resorting to such premises in the ordinary course of business and that the position is in no way analogous to or comparable with, for instance, that of a local body in respect of highways. In England, at common law, the duty to repair the highways and keep them in a proper condition ordinarily rested with the parish and in case of breach thereof the only remedy was an indictment of the inhabitants and no action for damages lay either against the inhabitants or against their surveyor. The immunity which attached to the surveyor at common law now attaches to the local authorities to whom the duties of the surveyor are transferred by statute. In *Gibson* v. *Mayor of Preston*[3], it was held that in respect of personal injuries sustained by a member of the public due to non-repair of a highway, no action for damages can be brought against the local board of health constituted under the Public Health Act. In India also it is well-settled that a highway authority will not be liable in damages in respect of a mere non-feasance, *Rahim Baksh* v. *Municipal Board of Bulandshal*.[4] In regard to the duty owed by an occupier of premises, the leading authority is the decision in *Indermaur* v. *Dames*[5], where the occupier of premises was held liable in damages in respect of injuries sustained by a person who was on the premises on lawful business, consequent on his falling down through a hole in the floor, there being no proper warning to apprise any in-

1. (1911) Mad. W.N. 133.
2. (1931) I.L.R. 53 All. 786 (F.B.).
3. (1870) 5 Q.B. 218.
4. A.I.R. 1939 All. 213.
5. (1866) 1 Com. P. C. 274.

vitee of the existence of the danger. *Norman* v. *Great Western Railway Company*,[1] holds that doctrine of *Indermaur* v. *Dames*[2], is applicable to railway companies and that the duty of the company towards persons resorting to its stations and yards is analogous to that of the occupier of premises towards persons who went there on lawful business. In other words the duty of the railway in such a case is the duty to take reasonable care that its premises are reasonably safe for persons using them in the ordinary and customary manner and with reasonable care. Thus the railway company will be liable not merely in case of misfeasance but also in respect of non-feasance amounting to negligence on its part. In the case under notice, the railway company had allowed a depression to remain in the railway platform into which a passenger in his anxiety to board the train slipped and sustained injuries. The decision is also noteworthy for its enunciation that mere anxiety on the part of a passenger to catch a train could not without more amount to contributory negligence or carelessness on his part.

RADIANT CHEMICAL COMPANY, LIMITED, *In re*:, (1943) I.L.R. 22 Pat. 204.

A point of some nicety and one on which there is little by way of authority was decided in this case, which held that a public company can be converted into a private company by suitable alterations in the articles of association and that it is not the law that such conversion cannot be effected except by winding up the public company and re-constituting it as a private company. It is of the essence of a private company that by its articles it prohibits any invitation to the public to subscribe for its shares, if any, or the debentures of the company [section 2 (1) (13), Companies Act]. In the case of a public company there is no such prohibition and hence the public are interested. So when a private company is converted into a public company by amendment of its articles of association, certain information has to be sent to the Registrar of Joint Stock Companies, default in regard to which would be punishable. The information has to be lodged because the public are interested in the matter and their interests have to be safe-guarded. Section 154 of the Companies Act deals with the conversion of a private company into a public company and proceeds on the assumption that the conversion can be effected by appropriate alterations in the articles of association. There is however nothing in the section to suggest that a public company cannot be converted into a private company in a similar way. There was no need for a specific provision to deal with such conversion because there is no question of the public having any interest in the conversion or of the registrar requiring any information. in other words the *raison de'etre* behind the necessity to lodge the information in the case of a public company is absent in the case of a private company. In England it seems to be well-settled law that a public company can be converted into a private company by suitable alterations in its articles[3]. The instant decision follows the English rule and incidentally draws attention to the fact that the amendments to the aricles of association in such a case do not require the confirmation of the High Court and that under section 82 of the Companies Act the Registrar will be bound to file them.

JAINARAIN SAH v. KING EMPEROR, (1943) I.L.R. 22 Pat. 600.

This case contains a valuable pronouncement on the principles that should underlie the passing of sentences in criminal cases. Theories of punishment have been numerous and shifting. In any event, deterrence is not its only aim. It is true that standards of punishment may not be uniform. Even so, there are certain considerations to guide a tribunal in awarding punish-

1. (1915) 1 K.B. 584.
2. (1866) 1 Com. P. C. 274.
3. Halsbury's Laws of England, 2nd Edition, Vol. 5, p. 133.

ments. In the present case the accused had been convicted under rule 38 (*a*) of the Defence of India Rules and was originally sentenced to rigorous imprisonment for five years, which on appeal was reduced to three years and finally by the High Court in revision to the period already undergone. The conviction was in the words of Shearer, J., "in respect of a casual remark purporting to repeat some quite ridiculous and fantastic claim made in a Japanese broadcast", consisting of "less than twenty words", made "in the presence of less than a dozen persons", not one of whom seemed to have "attached any significance to it at all". In reducing the sentence, Varma, J., observed: "Courts, while awarding sentence, should be cautious in making the sentence proportionate to the nature of the offence committed and should not award a sentence which may seem to be of a vindictive nature. An unnecessarily severe sentence is apt to defeat the object for which it is passed. . . . . . The sections prescribing sentences give the limit to which a sentence can be passed but that does not mean that the maximum sentence should be awarded in each case. The extent of sentence has to be judged upon the circumstances of each case." Shearer, J., added: "having regard to what the petitioner actually did, the sentence was utterly disproportionate and was, in my judgment not unlikely to do harm by creating the impression that there must be something in the claim made by the Japanese if the authorities thought it necessary to punish the mere casual repetition of it so severely". It is to be hoped that the admonition will always be borne in mind by the subordinate courts in awarding sentences.

JAGADISH CHANDRA DEO DHABAL DEB *v.* GAYA PRASAD SINGH, (1943) I.L.R. 22 Pat. 648.

This decision deals with a point concerning the relationship of landlord and tenant. It holds that a suit to eject a ryot from a portion of the tenancy on the ground that he has misused it is not maintainable. The point arose under section 22 of the Chota Nagpur Tenancy Act, 1908, but is of wider interest in view of analogous statutory provisions in the Tenancy Acts of other provinces. The misuse found was the diversion of a portion of an agricultural holding for building purposes and the erection of houses on such portion. Section 22 provides for ejectment where the tenant has misused the holding in the manner contemplated by section 21. In passing, it may be noted that section 68 provides generally that no tenant shall be ejected from his tenancy *or any portion thereof*. In the Bengal Tenancy Act, section 25 provides that a ryot cannot be ejected from his holding except (among other things) on the ground "that he has used the land comprised in the holding in a manner which renders it unfit for the purposes of the tenancy". Likewise section 151 of the Madras Estates Land Act provides that a landholder may sue for the ejectment of a ryot from his holding only on the ground that he has materially impaired the value of the holding for agricultural purposes and rendered it substantially unfit for such purposes. Similar provisions are to be found in sections 52 to 69 of the Central Provinces Tenancy Act, sections 61-65 of the North-West Province Tenancy Act and sections 39 to 48 of the Punjab Tenancy Act. In the first place, does the mention in section 68 of the Chota Nagpur Tenancy Act of the tenant not being liable to be ejected from his tenancy or any portion thereof mean that though there is no misuse of the holding generally, if however, there is misuse in regard to portions of it, he can be ejected from such portions or does it mean that where there is no misuse of the holding generally there can be no ejectment of the tenant at all, not even with reference to any portion of it? Are the mention in section 68 of the Act of the tenant not being liable to be ejected ordinarily from any portion of the tenancy even and the non-mention of anything like that in the other Acts a mere accident having no significance? The Chota Nagpur Tenancy

Act like the other Tenancy Acts provides for the sale or purchase of a part of the holding or tenure but nowhere does it provide for ejectment of a tenant from a part. The view was therefore taken, following the decision in *Trustees, Chokkanathaswami Temple* v. *Vadivalmuruga Nadar*,[1] that the reference to a part of the holding in section 68 of the Chota Nagpur Tenancy Act may well be merely to emphasise a preservation against ejectment save as provided in the Act. Again it is difficult to appreciate how it will be open to a landlord to split up his tenant's tenure by declaring that he has no right to a portion of the land comprised therein because a misuse had been committed, but at the same time he has right to remain in possession of the remainder, see *Ram Kanie Mandal* v. *Gunesh Chunder Sen*.[2] The principle laid down in *Kamaleswari Prasad Singh Bahadur* v. *Maharaja Harbullabh Narain Singh Bahadur*,[3] that no suit to eject a tenant from a portion of his tenancy only will be competent is really a general principle of law governing the relationship of landlord and tenant.

Decisions have repeatedly held that misuse to justify ejectment must affect the holding or tenure as a whole. No doubt this will be a question of fact depending upon the circumstances of individual cases, the size of the holding, the extent of land withdrawn from agricultural purposes and the effect of such withdrawal upon the fitness of the holding taken as a whole for a profitable cultivation, *Hari Mohan Misser* v. *Surendra Narayan Singh*[4]. If the holding as a whole is affected it is immaterial whether the alleged acts of impairment were actually done over the entire holding or only on parts of it, *Rama Chetty* v. *Arunachalam Chettiar*[5]. On the special facts of the respective cases, applying the aforementioned tests, the excavation of a tank on two bighas in an agricultural holding of 66 bighas was held to be no impairment of the holding as a whole, *Sowrindra Mohan* v. *Rahim Baksh*,[6] likewise the use of 1|20th of a holding to erect buildings for housing cattle and storing manure was held insufficient in *Zamindar of Seithur* v. *Dorai Venkataraju*[7] to support a case for ejectment. In *Rama Chetty's case*[5], it was held that the use of 1|48 of the holding which was an agricultural one, as building site will not justify a claim to eject. On the other hand in *Srish Chandra Ganguly* v. *Esum Musalli*[8], the erection of a mosque on a holding was held to impair the holding as a whole for agricultural purposes and ejectment was allowed. Similarly in *Zemindar of Muktyala Estate* v. *Kameswara Somayajulu*[9], the diversion of 14 acres out of 15 acres and 65 cents of an agricultural holding to be used as building sites—though a building had been erected actually only on a plot of about 100 square yards—was held to afford cause for ejectment. So also in *Narayan Rao* v. *Zemindar of Muktyala Estate*[10], the use of two cents of land for building but with a compound 1 acre in extent out of an agricultural holding comprising 2 1|3 acres was held to justify the passing of an order of ejectment.

SATYANARAYANA *v.* KING EMPEROR, (1943) I.L.R. 22 Pat. 681.

"This case is to my mind apt to nip any budding affection which one might have had for the Code of Criminal Procedure". Thus observed Brough, J., in the above case where one of the chief contentions was that no inference can be drawn adversely to the accused from the statements made by them in the course of a departmental enquiry because they were not *specifically put to them in their examination under section* 342 *of the Criminal Procedure Code*, they hav-

1. (1936) 161 I.C. 230: A.I.R. 1936 Mad. 220.
2. (1933) 33 Cal. L.J. 513.
3. (1905) 2 Cal. L.J. 369.
4. (1907) I.L.R. 34 Cal. 718: L.R. 34 I.A. 133: 17 M.L.J. 361 (P.C.).
5. (1915) 29 M.L.J. 724: I.L.R. 39 Mad. 673.
6. (1911) 15 I.C. 497.
7. (1939) 1 M.L.J. 433.
8. (1934) I.L.R. 61 Cal. 75.
9. (1926) 50 M.L.J. 97.
10. (1928) 54 M.L.J. 621: I.L.R. 51 Mad. 478.

ing stated that they would file and in fact did file a written statement. The point is one of considerable importance affecting the general adminisration of justice and according to Brough, J., illustrates the inconvenience of the rule existing in India that the accused cannot give evidence. The learned Judge forcefully remarked: "That rule has been abrogated in England for 45 years and I understand the general view is that the abrogation has been favourable to the administration of justice. The English practice leaves it to the accused to give evidence or not as he likes and if he elects to give evidence it is for his legal advisers to elicit such facts as they consider material; his explanations are liable to be tested by cross-examinations, but this is no disadvantage to the innocent accused. The position of the Court under section 342 is very invidious; if it fails to ask proper questions no inference may be drawn against a prisoner from his failure to give a satisfactory explanation which may result in the quashing of a conviction; if on the other hand, the Court presses the witnesses too hard it is charged with cross-examining the accused which is equally not permitted". No doubt there is much to be said in favour of the English practice but it will always be a debatable question whether the benefit which may accrue to the accused by giving testimony may not be out-weighed by the risk of being subjected to a searching cross-examination.

Where having heard all the evidence, the accused in answer to questions put to them in their examination under section 342, merely intimated that they would file a written statement and in fact filed one there cannot be any duty on the part of the Court to go on and ask specific questions, *Bhagwat Singh King Emperor.*[1] As observed by Bucknill, J., in *Saiyid Mohiuddin* v. *King Emperor*:[2] "Provided the accused has in fact had a reasonable and substantial opportunity of exercising the privilege accorded to him by the provisions of section 342, that is, of either orally or in writing saying what he wishes to say in explanation of what has been alleged against him, a technical failure or omission in the procedure ought not to be regarded as rendering a trial wholly nugatory". As recognised by Brough, J., in the instant case, different considerations would arise if the accused were not legally represented or the Court thought for any reason that the accused or his legal adviser did not properly appreciate the case that had to be met.

RAJABALLAM SINGH *v.* KING EMPEROR, (1943) I.L.R. 22 Pat. 726.

A noteworthy point of practice is laid down in this case which points out that where the High Court directs the release of an accused on bail to the satisfaction of the District Magistrate, the latter cannot demand a cash deposit as a condition to the release of the accused. Chapter XXXIX of the Criminal Procedure Code only contemplates the execution of a bond with sureties and the form of the bond is prescribed in No. 42 of Schedule V. The intention of the law undoubtedly is that a man is ordinarily to be at liberty and it is only if he is unable to furnish such moderate security as may be required of him appropriate for the purpose of securing his appearance before a Court that he should remain in detention, see *Emperor* v. *Mir Hashmali,*[3] This principle will hold good not merely pending trial, but even where after conviction the Court has thought fit to release a person on bail pending any appeal or revision. Section 499, Criminal Procedure Code itself points out that the amount of every bond executed under Chapter XXXIX shall be fixed with due regard to the circumstances of the case and shall not be excessive. There is nothing in the section to justify the demand of a cash deposit.

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1. (1924) I.L.R. 4 Pat. 231.
2. (1925) I.L.R. 4 Pat. 488, 494.

1. (1917) 20 Bom.L.R. 121, 123.

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NOTES OF RECENT CASES

Kuppuswami Ayyar, J.
2nd December, 1943.

Subban Samban, *In re.*
Crl. R. C. No. 468 of 1943.
(Crl. R. P. No. 425 of 1943).

Penal Code (XLV of 1860), *section* 211—*Gist of offence under—Gangman in Railway reporting to station-master about removal of keys on the line—If can be convicted of offence under section* 211 *of the Penal Code.*

The petitioner was a gangman employed in a railway company. He noticed a person removing two keys on the railway line. He caught hold of the latter who however ran away. The gangman picked the two keys and handed them over to the station-master and gave a report to him only for the purpose of giving information as regards the state of the railway line. On a complaint against the gangman for an offence under section 211 of the Indian Penal Code,

Held: that the station-master was not a person who was entitled to investigate the crime. The information was not given with intent to set the criminal law in motion, but in the discharge of his duties as gangman to give such information about the line to the station-master; accordingly, the gangman cannot be convicted for the offence punishable under section 211 of the Indian Penal Code by reason of his having given the report even though what was stated there was found to be false.

T. K. Rajagopalan for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Kuppuswami Ayyar, J.
2nd December, 1943.

Lakshmana Goundan and others, *In re.*
Crl.R.C. No. 804 of 1943.
(Crl.R.P. No. 750 of 1943).

Criminal Procedure Code (V of 1898), *section* 106—*Order under for execution of surety bonds—When can be passed.*

Section 106 of the Criminal Procedure Code is not a section that could be freely used without definite materials before the Judge. For coming to the conclusion that it is necessary to require the accused to execute a bond, there must be materials on which such a conclusion could be based. The circumstance that "there is evidently a faction in the village" is insufficient. When there is nothing to indicate that the accused were members of the faction or that they quarrelled about any matter connected with the faction the making of an order under section 106 of the Criminal Procedure Code is not justifiable.

P. S. Kailasam for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Kuppuswami Ayyar, J.
2nd December, 1943.

Seshappa Chetti, *In re.*
Crl.R.C. No. 632 of 1943.
(Crl.R.C. No. 583 of 1943).

Criminal trial—Appeal—Re-trial with permission to let in additional evidence—Order without going into the question whether on the evidence the conviction was justified or not—Sustainability.

The petitioner was convicted for offences punishable under rule 81 (4) read with rule 81 (2) of the Defence of India Rules in respect of two sales of kerosine and sentenced on each count. On appeal the Sessions Judge (without going into the question and deciding whether on the evidence the conviction was justified or not) felt that it was possible to let in more evidence and therefore set aside the conviction and sentence and ordered a re-trial after giving permission to both sides to let in additional evidence. On revision,

Held: The Sessions Judge was not justified in doing so. It is only if he found that the evidence already let in is not sufficient it would be open to him to direct the prosecution to let in additional evidence or ask the lower Court to record the evidence and send the evidence so recorded to him for consideration.

V. T. Rangaswami Aiyangar and *K. Kalyanasundaram Aiyar* for Petitioner.
The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.
K.S.

Mockett and Horwill, JJ.
10*th December*, 1943.

Chinna Appanna, *In re.*
R.T. No. 221 of 1943.

Criminal Procedure Code (*V of* 1898), *sections* 164 *and* 533—*Omission of magistrate to attach certificate as required by section* 164 *to confessional statement of accused—Does not invalidate the statement—Omission cured by magistrate's evidence in accordance with section* 533.

The omission of the magistrate to attach the certificate which section 164 of the Criminal Procedure Code requires to be attached to a statement made by an accused of a confessional nature, does not invalidate the statement where the evidence contemplated by section 533 of the Code has been given. No possible injustice could have been brought about by the omission, especially where the evidence shows that everything that the statement requires to be certified as being done was in fact done. The omission is cured by the magistrate's evidence in accordance with section 533 of the Code of Criminal Procedure.

Decision in R. T. No. 157 of 1941, relied on.
N. Kotyswara Rao for Accused.
The Assistant Public Prosecutor (*N. Somasundaram*) on behalf of the Crown.
K.S.

Bell, J.
23*rd December*, 1943.

Kewalram *v.* Collector of Madras.
Application No. 2670 of 1943.

Defence of India Rules (1939), *rule* 75-*A*—(*Inserted by Notification No.* 1336, *O.R.*|42, *dated April,* 25, 1942)—*Requisitioning property under—If can be made only when absolutely necessary for maintenance of supply and services to the community and for the defence of the country—Housing the Collector of Madras—If a purpose which justifies requisitioning of bungalow under rule* 75-*A of the Defence of India Rules—Delegation of power to requisition by Government to Collector—Propriety.*

The Provincial Government of Madras being of opinion that a particular bungalow was a suitable place for housing the newly posted Collector of Madras, directed the outgoing Collector to requisition the bungalow under rule 75-A* of the Defence of India Rules. The Collector thereupon issued an order asking the owner of the bungalow to hand over possession. The owner filed an application under section 45 of the Specific Relief Act for directing the Collector of Madras to rescind his order and forbear from requisitioning the bungalow.

It was contended on behalf of the owner that orders requisitioning property under rule 75-A of the Defence of India Rules should be passed only when absolutely necessary for the maintenance of the supply and services to the community and for the defence of the country. It was also contended that powers under rule 75-A could not be delegated except on specific occasions like rioting, fire, etc.

Held, that it was in the public interest that the Collector was suitably housed and the order requisitioning the bungalow for that purpose under rule 75-A of the Defence of India Rules was proper.

Held further, that the delegation by the Government to the Collector of the powers to requisition the bungalow under rule 75-A of the Defence of India Rules was proper.

V. V. Srinivasa Ayyangar, N. T. Shamanna and *N. Srinivasa Aiyangar* for the Applicant.

The Advocate-General (*Sir Alladi Krishnaswami Ayyar*) instructed by the Crown Solicitor for the Collector of Madras.
K.S.

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* The relevant portion of the rule is as follows:—

Rule 75-A, *Requisitioning of Property*: (1) If in the opinion of the Central Government or the Provincial Government it is necessary or expedient so to do for securing the defence of British India, public safety, the maintenance of public order or the efficient prosecution of the war or for maintaining supplies and services essential to the life of the community, the Government may by order in writing requisition any property movable or immovable and make such further orders as appear to the Government to be necessary or expedient in connection with the requisitioning.

Provided that no property used for the purposes of religious worship and no such property as is referred to in rule 66 or in rule 72 shall be requisitioned under this rule.

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Mockett and Kunhiraman, JJ. Venkata Rao *v.* Padmavalli Tayaramma.
2nd December, 1943. **A. A. O. No. 338 of 1942.**

Arbitration—Award effecting partition—Direction that parties shall discharge the debts due to others according to the accounts in half and half—If a complete award—Award under mistake as to true scope of Hindu Women's Rights to Property Act before Federal Court's decision—Effect on its validity.

In a reference to arbitration by a Hindu and his brother's widow it was stated that under the will of her husband the widow had acquired a right to his entire properties and on the strength of the will and on the strength of the Hindu Women's Rights to Property Act she was entitled to have a partition effected in respect of the entire properties, goods and other assets of the joint family. Accordingly the arbitrators divided the properties and the debts. The award stated that the parties shall discharge the debts due to others according to the accounts in half and half. It was contended that the arbitrators in effect refused to divide the debts on the ground of inconvenience, and also that the widow's claim on the strength of the Hindu Women's Rights to Property Act was based on a mistake of fact (as the Act as held by the Federal Court could not apply to agricultural property) which vitiated the award.

Held: All that the award decided as to the division of the debts was that it was not possible to ascertain the precise figures of the debts which were due to the different people, but when ascertained the parties should discharge them according to the accounts in equal shares. It was a sensible and businesslike method of dealing with the outstanding matter. Where only ministerial acts remain to be done the award cannot be said to be incomplete for that reason. 14 Cal.L.J. 188 referred to.

Held further, that the mistake as to the scope of Act XVIII of 1937 was a mistake as to the general law and cannot be invoked to obtain the intervention of the Court. An objection to the award on that ground must also fail.

K. Krishnaswami Aiyangar for Appellant.

B. V. Ramanarasu and V. Govindarajachari for Respondent.

K.S.

Kuppuswami Ayyar, J. Venkataratnam *v.* Venkataratnam.
7th December, 1943. **A. A. O. No. 150 of 1942.**

Partnership Act (IX of 1932) Section 29—Lease in favour of three partners from Government in respect of lands with salt-pans and brine-pans—Clause prohibiting taking in of new partners—Sub-partnership between one of the partners and another who was to receive share of profits of transfering partner—Not opposed to public policy.

X, Y and Z obtained a lease from the Government in respect of certain lands with all the salt-pans and brine-pans in them. There was a provision *inter alia* that the lessees shall not, except with the written consent of the lessor, assign, sublet or part with the possession of the leased land or any portion thereof and shall not transfer by sale or otherwise the powers granted to them. There was also a proviso that nothing contained therein shall prevent the lessees at any time from taking any partner or partners into the business carried on by them under the lease who may be approved by the commission. X, Y and Z were each entitled under their partnership arrangement to a one third share in it. X took into partnership, A who was given a right to receive a share of the profits of X. In a suit by A for settlement of accounts and recovery of his share of profits,

Held: that the arrangement between X and A was not illegal or opposed to public policy as A was not given any right to interfere with the business of the partnership.

Case-law discussed.

P. Satyanarayana Rao for Appellant.

V. Govindarajachari for Respondent.

K.S.

Mockett and Horwill, JJ. Kotigadu, *In re.*
9th December, 1943. **R. T. No. 220 of 1943.**
Cr. App. No. 770 of 1943.

Evidence Act (I of 1872), section 114, illustration (a)—Accused person last seen with person murdered shortly before the murder and later found in possession of jewels of the deceased—Presumption.

It is a reasonable deduction from the circumstance that the accused person was last seen with the deceased shortly before the murder and was later found in possession of the jewels of the deceased, that he committed the murder.

Narayana v. *King-Emperor*, I.L.R. 56 Mad. 231 followed.

A. Bhujanga Rao for the Accused.

The Assistant Public Prosecutor (*N. Somasundaram*) on behalf of the Crown.

K.S.

N R C

Kunhi Raman, J. Sherfuddin Atta Ahmed *v.* Syed Yousuff.
9th December, 194[illegible] **C. C. C. App. Nos. 52 and 53 of 1942.**

Mahomedan Law—Burial ground—How far res extra commercium.

A cemetery or graveyard is consecrated ground and cannot be sold or partitioned. But there may be a large piece of land in which only a portion may be used as a cemetery or graveyard and in that event it is only the portion that is actually used for that purpose that can be incapable of private ownership. Whether a place is *makbara* (a burial ground) or not depends on the number of persons buried there, or evidence of dedication derived from the testimony of witnesses or reputation.

B. Pocker for Appellant.
M. A. Srinivasan for Respondents.
K.S.

Wadsworth, J. Rangaswami Ayyangar *v.* Subbaraya Goundan.
10th December, 1943. **A. A. A. O. No. 102 of 1943.**

Civil procedure Code (*V. of* 1908), *Order* 21, *Rule* 18—*Adjustment of cross decrees in execution—When complete—Application for stay and scaling down under Madras Act (IV of* 1938) *Sections* 19 *and* 20—*When competent*.

The adjustment contemplated in order 21, Rule 18 of the Code of Civil Procedure does not come into being automatically the moment there are two applications for execution of cross decrees between the same parties. The satisfaction of the smaller decree and the part-satisfaction of the larger decree are the result of an act of the Court making orders in the two execution applications and until those orders have been passed the two decrees do not become adjusted one against the other. Till such orders are passed stay can be asked for and the decree scaled down under Madras Act (IV of 1938), sections 19 and 20.

A. C. Sampath Aiyangar for Appellant.
K. V. Ramachandra Aiyar and S. Ramachandra Aiyar for Respondent.
K.S.

Mockett and Kunhi Raman, JJ. Krishnamoorthy *v.* Venkata Pitchayya.
10th December, 1943. **A. A. O. Nos. 148 and 292 of 1942.**

Provincial Insolvency Act (*V. of* 1920), *section* 44 (2)—*Insolvency of mortgagor—Conditional order of dicharge—Effect—Realisation by sale of hypotheca after such discharge—Right to personal decree for balance.*

On the 28th May 1925 there was a mortgage by the 1st, 2nd and 3rd defendants for Rs. 18,500 and interest. In 1926 the first defendant was adjudicated insolvent. In 1929 the hird defendant was adopted by a stranger. A preliminary mortgage decree was passed on 30th July 1930 and a final decree was passed on 13th November 1930. The hypotheca was sold on 7th October 1931. On the 7th August 1934 there was a personal decree. Meantime, on 29th July 1931, the first defendant was discharged in the following terms:—

"The petitioner will be given discharge subject to the only condition that if he acquires any rights to any properties under O. S. 59 of 1929 they will become vested in the Official Receiver for the benefit of the general body of creditors."

On appeal against the personal decree,

Held: The position with regard to the discharge of an insolvent, whether with or without conditions, is the same. An order of discharge subject to conditions releases the insolvent from all debts provable in insolvency as much as an absolute order of discharge. If an order with a condition attaching is made, he ceases to be an insolvent, but it may be that it is necessary for the Official Receiver or Official Assignee to administer his estate for a time after the order, for the purpose of realising assets. As on the 29th July 1931 the insolvency proceedings ceased by reason of the order of discharge (though conditional) and the hypotheca in this case was sold on 7th October 1931 there is no bar to the passing of a personal decree against the discharged insolvent.

(1942) 1 M.L.J. 11 applied.

V. Govindarajachari and K. Mangachari for Appellant.
K. Kameswara Rao for Respondent.
K.S.

Kuppuswami Ayyar, J. Chinnan *In re.*
16th December, 1943. **Crl. R. C. No. 1036 of 1943.**
(Crl. R. P. No. 975 of 1943).

Criminal trial—Offence under Penal Code, section 366—*Magistrate refusing permission to compound—Duty to question the witnesses himself and not discharge the accused for want of evidence.*

When a magistrate has refused to give permission to compound an offence (in this case one under section 366 of the Penal Code) it is his duty to elicit the necessary facts from the witnesses (compounding complainants who abstain from giving evidence)—by himself questioning them instead of making a farce of the trial and discharging the accused on account of want of evidence.

C. D. Venkataraman for Petitioner.
K.S.

Kuppuswami Ayyar, J.
17th December, 1943.

Thiruvengata Kadungan, *In re.*
Crl. R. C. No. 729 of 1943.
(Case Referred No. 43 of 1943.)

Criminal Procedure Code (V of 1898), *sections* 380 *and* 258 (1)—*Powers of Magistrate to whom a convicted person is sent under section* 380.

When an accused person comes before a Magistrate under section 380 of the Code of Criminal Procedure, since he has already been convicted it is not open to the Magistrate acting under that section to set aside the conviction already recorded by the Referring Magistrate and acquit him purporting to Act under section 258 (1) of the Criminal Procedure Code. All that he could do is to submit the papers to the High Court for revising the order of the Referring Magistrate if he considers that the conviction is improper.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Kunhi Raman, J.
17th December, 1943.

Krishna Atiyoti *v*, Province of Madras represented by the Collector of South Kanara.
S. A. No. 1301 of 1942.

Madras Revenue Recovery Act (II of 1864). *section* 36—*Provision requiring place of sale to be specified in the notice—Mandatory—Notification that sale will be held in a named village without mentioning exact place—Is an irregularity which vitiates sale—Inadequacy of price—Inference.*

Where the notification of sale referred to in section 36 of the Madras Revenue Recovery Act did not mention the exact place in the six square miles of the village where the sale was going to be held for arrears of revenue there is co compliance with the requirements of the section. According to the section it is obligatory to mention the precise place, especially so where the village is six square miles in extent and as is characteristic of the district of Malabar and South Kanara the residences of the inhabitants will be scattered all over the village and not crowded together in any particular part of it in the shape of a street or streets.

Direct evidence is not necessary to connect the inadequacy of price realised with a material irregularity where the latter has been proved. The relation of cause and effect between the two may be inferred where such inference is reasonable. I.L.R. 22 Mad. 440 relied on.

P. Govinda Menon for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*), *P. Anandan Nair, K. Srinivasa Rao* and *B. Pocker* for respondents.

K.S.

Shahabuddin, J.
17th December, 1943.

Pethachi Chettiar *v.* Subban Chettiar,
A. A. O, No. 170 of 1943.

Civil Procedure Code (V of 1908) *Order* 34, *Rule* 5—*Execution of mortgage decree—Hypotheca divided into three lots and third lot sold and sale confirmed—Subsequent sale of other two lots—Petition to set aside sale of the two lots—Deposit by judgment-debtor of the decree amount then due plus* 5 *per cent—Order under Order* 34 *Rule* 5 *and dismissal of petitions to set aside sale—Effect on the sale.*

In execution of a mortgage decree, the hypotheca was divided into three lots and the third item was sold on the 10th November 1940. and the sale was confirmed on the 31st March 1941. The other two items of the hypotheca were brought to sale on the 5th and 6th February 1941 and P purchased them at the Court auction. On 5th March 1941, two petitions were filed to set aside this sale. While the petitions were pending, the judgment-debtor deposited on the 3rd December 1942 the amount due under the decree on that date plus the 5 per cent that has to be paid to the auction purchaser and prayed for orders under Order 34 Rule 5 of the C. P. Code. To this application P raised an objection that the deposit according to Order 34 Rule 5 should be of the entire amount of the decree and as that amount had not been deposited the petition should not be allowed. The District Judge overruled tbe objection and allowed the application on 28th December 1942. Thereupon the mortgagor's petitions to set aside the sale which were pending were dismissed as they were naturally not pressed. On appeal by P it was contended: (1) that according to section 60 of the Transter of Property Act there can be no partial redemption of the mortgage; (2) that under Order 34 Rule 5 C. P. Code the payment that the judgment-debtor has to make into Court is of all amounts due from him under sub-rule 1 of Rule 4 of Order 34 which refers to the amount mentioned in the decree and (3) that under Order 21 Rule 92 a sale has to be automatically confirmed on a petition to set aside the sale being dismissed and as the petitions to set aside the sale in the present case were dismissed, the sales should have been confirmed. Rejecting these contentions.

Held: (1) What Section 60 of the Transfer of Property Act prohibits is redemption by one of the moatgagors of his share of the mortgaged property. Where, as in the present case there is only one mortgagor and one mortgagee there is no question of one of the mortgagors trying to redeem his share. (2) It cannot be contended that the entire decree

amount including what has been already realised by the earlier sale of one item should be deposited. It is only the balance that is due that has to he deposited. The words "before the confirmation of a sale in Order 34 Rule 5 C.P. Code mean only before the confirmation of the sale in respect of which the deposit is sought to be made and not before confirmation of an earlier sale of one of the items. The mortgagor is entitled to redeem under Rule 5 of Order 34 the two lots sold snbsequently by depositing before that sale is confirmed the amount due under the decree on the date the sale of these items took place with the required 5 per cent payable to the auction purchaser. (3) It cannot be said that the auction purchaser automatically acquires a right to the property on the dismissal of the petitions to set aside the sale irrespective of the circumstances under which it was dismissed. Accordingly the deposit having been made under Order 34, Rule 5 the sale cannot be confirmed.

R. Gopalaswami Aiyangar and *R. Kesava Aiyangar* for Appellant.

P. V. Rajamannar, K. Subba Rao and *R. Ekambaram* for Respondent.

Happell, J. Paul *v.* Eswara Ayyar.
3rd January, 1944. **A. A. A. O. No. 179 of 1943.**

Malabar Tenancy Act (XIV of 1930), *section* 33—*Benefits under—Right to—Possession for* 10 *years in the capacity of tenant essential—Possession as usufructuary mortgagee of leaseholder's interest cannot be tacked on to subsequent possession as assignee of the lease.*

A usufructuary mortgagee of leasehold Interest is not a tenant within the meaning of the Malabar Tenancy Act and though he had been in possession as such mortgagee from 1929 to 1937 and after that till the date of suit in 1942 as assignee of the lease, he is not entitled to the benefits of section 33 of the Malabar Tenancy Act of purchasing the right in the kudiyiruppu. The words "continuous occupation of a tenant" in section 33 mean what they say and a person who applies for the benefit conferred by the section must not only be a tenant on the date of the application but must be a tenant throughout the required period of ten years of continuous occupation.

D. A. Krishna Variar for Appellant.

P. S. Narayanaswami Aiyar for Respondent.

Horwill, J. Rukmini Ammal *v.* Official Liquidator
10th January, 1944. of the Sedhinipuram Co-operative Society.
S. A. No. 139 of 1943.

Madras Co-operative Societies Act (VI of 1932), *section* 48—*Suit against liquidator of society—Sanction of Registrar essential.*

The appellant, a member of a Co-operative Society, was called upon in the liquidation to pay the sums due to the society by certain relatives of her husband, who were also members of the society, whose debts her husband had promised to pay. She paid Rs. 1000 to the Liquidator out of the Rs. 5000 demanded, but failed to pay the remainder. The appellant filed a suit againt the society in liquidation for a declaration that the order of the liquidator calling upon her to pay the amount as contribution was *ultra vires*, void and illegal.

Held: Whether or not a creditor can sue a person who is not a debtor and who merely undertakes to pay the debts of a debtor and whether or not the society acted without jurisdiction in demanding the amount from the appellant; the sanction of the Registrar was a condition precedent to the filing of the suit, whether the liquidator acted with jurisdiction or not. *Govinda Chettiar v. Uttukottai Co-operative Society.* I.L.R. 1940 Mad. 929 which was contended to be wrong held to be binding and followed.

The Advocate General (*Sir Alladi Krishnaswami Ayyar*), *K. R. Rangaswami Aiyangar, V. Rajaram* and *C. R. Pattabhiraman* for Appellant.

P. Govinda Menon for Respondent.

K.S.

Kuppuswamy Ayyar, J. Kasiviswanatha Bhaskaramurthi and others, *In re.*
12th January, 1944. **Cr. R. C. No. 779 of 1943.**
(Cr. R. P. No. 126 of 1943.)

Criminal trial—Revision petition to Sessions Judge against discharge of accused—Remand—Direction to the Magistrate to frame a charge on the evidence already let in—No jurisdiction to give.

Where after an accused person had been discharged the matter was taken to the Sessions Judge in Criminal Revision Petition and he set aside the order of discharge and remanded the case with a direction to the Magistrate to frame a charge on the evidence already let in.

Held, that the Sessions Judge had no jurisdiction to direct a charge to be framed and that it was a matter to be considered by the Sub-Magistrate to whom the case was remanded. It will be open to the Sub-Magistrate after holding an enquiry to dischage the accused again.

B. V. Ramanarasu for the Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Happell, J. Pushpavathi Ammal *v.* Meenakshi Ammal.
3rd January, 1944. **A.A.A.O. No. 272 of 1942.**

Limitation Act (IX of 1908), *Article* 182 (5)—*Execution petition returned on the ground that succession certificate was necessary—Re-presentation with endorsement that the petition may be dismissed as it was made only to save limitation—How far a step-in-aid of execution.*

An execution petition complying with the provisions of Order XXI, rule 11 sub-rule (2), was returned because for a part of the application a succession certificate was necessary. The execution petition was then re-presented with the following endorsement:—*This petition is filed only to save the decree from the bar of limitation. This petition may be numbered and dismissed allowing the petitioner to file later an execution petition with succession certificate.* The petition was dismissed as requested. On a question whether the petition was a step-in-aid which saved limitation,

Held: Whatever might be the position if an applicant for execution stated in the petition itself that he did not wish notice to issue and that the petition was filed merely to save limitation, as the endorsement in the present case that the petition was filed only to save limitation was made only by the pleader after the petition was returned for want of a succession certificate it cannot be said that the petition was not one made in accordance with law and therefore the order passed on the petition will be a final order which will save limitation.

Khalil-ur-Rahman Khan v. *Collector of Etah,* 66 M.L.J. 79 (P.C.), *referred to.*

T. K. Subramania Pillai for Appellant.

S. Panchapagesa Sastri for Respondent.

K.S.

Happell, J. Kuttiasan *v.* Mammad.
10th January, 1944. **S.A. No. 149 of 1943.**

Malabar Law—Tarwad—Assignee of junior member's rights to arrears of maintenance—Decree obtained by—Execution—Members in possession under family arrangement as maintenance holders—If can resist the execution proceedings—Mappilla Marumakattayam Act—Section 10—*Applicability and scope.*

The assignee of the rights of a junior member of a tarwad for arrears of maintenance from the tarwad, filed a suit to recover the arrears and obtained a decree. In execution of the decree he attached the tarwad properties. Certain minor members of the tarwad, who were in possession of tarwad properties as maintenance holders, then filed a suit to have the attachment set aside on the ground that the decree-holder must satisfy the decree from the other tarwad properties and had no right to bring their properties to sale. The contention that the plaintiff's properties were not liable to attachment and sale was founded on decisions that the karnavan cannot set aside an arrangement by which junior members of a tarwad have been put in possession of some of the tarwad lands in lieu of maintenance.

Held: Where a stranger holds a decree which is binding on the family, then, a mode of enjoyment of the property which is enforceable against the karnavan or other members of the family cannot stand against the claims which the decree-holder has against the family as a whole. The decree-holder therefore, is not precluded from proceeding against the appellants' properties merely because they held them under an arrangement in lieu of maintenance. Section 10 of the Mappilla Marumakattayam Act (1939), is not retrospective and has no application to the case and it cannot be contended that under section 10 the decree-holder must exhaust his remedy first against the personal property of the karnavan or the income of the tarwad property before the immovable property of the tarwad can be brought to sale. Even if section 10 is retrospective, it applies only to the execution of decrees obtained by an anandravan for maintenance. It cannot be contended that the assignee of the rights of an anandravan to maintenance stands in the shoes of the anandravan himself, for the purposes of section 10 of the Act.

K. Kuttikrishna Menon for Appellant.

S. Venkatachala Sastri for Respondent.

K.S.

Horwill, J. Subbarayan Chettiar *v.* Ameer Moidin Rowther.
10th January, 1944. **S.A. No. 185 of 1943.**

Malabar Tenancy Act (XIV of 1930), *section* 20 (5)—*Eviction of tenant—Permissible only where the jenmi genuinely requires the land for his own cultivation.*

In a suit by a jenmi for eviction of his kanamdar on the ground that the plaintiff required the land for his own cultivation under section 20 (5) of the Malabar Tenancy Act it was contended that when once the landlord tells the Court that he requires the land for his own cultivation, the Court has no discretion but to decree the suit for eviction and that the only remedy of the kanamdar in case the claim by the landlord is not *bona fide* and the landlord does not in fact take up the land for his own cultivation is to apply under section 20 (1) of the Act to be re-instated. Negativing the contention,

Held: that the Court is bound to dismiss the suit unless the landlord satisfies the Court that he genuinely requires the land for his cultivation. Though it is not easy to decide what

a man's intention with regard to something that is to happen in the future is the Court has nevertheless to decide the question on such material as it has before it.

I.L.R. 1942 Mad. 133, relied on.

D. A. Krishna Variar for Appellant.

P. Govinda Menon for Respondent.

K.S.

Kuppuswami Ayyar, J. Public Prosecutor, Madras *v.* Chinna Sathiraju.
12th January, 1944. **Crl. App. No. 658 of 1943.**

Defence of India Rules, rule 90 (2) (d)—*Acquisition and possession of coin by trader selling his wares—When offence.*

It cannot be said that the getting of coins by a trader in exchange of his wares is not an acquisition contemplated by the statute. A person who gets coins by vending his articles acquires such coins. It is not the acquisition that is made an offence but the acquisition beyond a particular limit, namely, beyond the amount required for daily needs.

Kalappa Mandaya Servai, In re (1943) 2 M.L.J. 280 and *Emperor* v. *Charan Das,* A.I.R. 1943 All. 329, relied on.

The Public Prosecutor (*V. L. Ethiraj*) in person.

V. T. Rangaswami Aiyangar for Respondent.

K.S.

Kuppuswami Ayyar, J. Public Prosecutor, Madras *v.* Dharmamma.
12th January, 1944. **Crl. App. No. 660 of 1943.**

Defence of India Rules, rule 90 (2) (d) *and rule* 90 (3)—*Possession on 7th February,* 1943, *of small coins in excess of what was required—Not an offence as the rule making it an offence was made only in April,* 1943.

It was only in April, 1943, that the Defence of India Rules were amended by making possession of small coins also an offence. Accordingly the possession of small coins in excess of what was required for the business and personal requirements of the person found in possession of the coins on 7th February, 1943, will not be an offence. On that date it was only the acquiring of small coins in excess of one's requirements either for business or personal needs that was punishable.

The Public Prosecutor (*V. L. Ethiraj*) in person.

D. Narasaraju for Respondent.

K.S.

Kuppuswami Ayyar, J. Venkataraju and others, *In re.*
13th January, 1944. **Crl. App. No. 652 of 1943.**

Defence of India Rules—Section 35 (4), *read with rule* 121—*Two bodies of persons actuated by same common object of paralysing British administration—Acts of sabotage done by one group—Members of other group—How far responsible—Penal Code (XLV of* 1860), *section* 143—*Offence under.*

Where there were two different bodies of persons actuated by the same common object of paralysing the administration of India by resorting to acts of sabotage, it cannot be accepted as a proposition of law that every one in both those groups will be responsible for the acts done by any one in either group. However a member of the second group joining the first group later after act of sabotage had been completed by the first group will be guilty of being a member of an unlawful assembly, an offence punishable under section 143 of the Indian Penal Code.

K. S. Jayarama Aiyar, P. Satyanarayana Raju and *G. Gopalaswami* for Accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Kuppuswami Ayyar, J. Ellappa and others, *In re.*
20th January, 1944. **Crl. App. No. 747 of 1943.**

Criminal trial—Question of admissibility of confessional statement—One for judge and not jury—Question whether such confession was voluntary—Question for judge only.

The question as to whether confessional statements of an accused person are admissible in evidence or not, is a matter to be decided by the judge and not a matter to be left to the jury for decision. If for deciding the admissibility of a particular piece of evidence it is necessary to find out whether another fact is true or not, that question also will have to be decided by the Judge and it is not a matter that can be left to the jury. For example, the question whether a confession was made voluntarily or not has to be decided by the Judge before he admits the confession in evidence.

The confession will be admissible only if it led to the discovery of an article and the police have no previous information. The question whether the police had previous information or not which could have led to the discovery is a matter to be decided by the Judge for the purpose of deciding the admissibility of the confession.

V. Rajagopalachari for Accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Happell, J.
4th January, 1944.

Ramaswami Reddiar *v.* Kuppalagu Pandithan.
A.A.A.O. No. 87 of 1943.

Provincial Insolvency Act (V of 1920), *section* 37—*Appointee under—Has power to sell property vested in him without express permission of the Court.*

An Official Receiver has power to sell property vested in him by an order of Court passed under section 37 of the Provincial Insolvency Act without the express permission of the Court.

I.L.R. 58 Mad. 908 at 925: 69 M.L.J. 364 (F.B.), explained.

(1943) 1 M.L.J. 127 and (1943) 2 M.L.J. 134, considered.

T. S. Vaidyanatha Aiyar for Appellant.

A. Sundaram Aiyar for Respondent.

K.S.

Horwill, J.
10th January, 1944.

Krishna Rao *v.* Venkatarama Rao.
S.A. No. 153 of 1943.

Hindu Law—Maintenance—Illegitimate sons—Right to maintenance—Limits—Man and woman living together—Presumption that they were married—If can be made.

A Hindu father is bound to maintain his minor son irrespective of whether he has any property or not; but his obligation to maintain an adult son depends upon his possession of joint family property. If he has such property then the illegitimate son is entitled to be maintained out of it both before and after his father's death.

Case-law discussed.

Where a widow has been living with a man, especially in a community where remarriage of widows was not allowed, the presumption that they were validly married cannot be drawn. It is dangerous to apply too closely English presumptions in matrimonial matters to the conditions in India. In the absence of proof of valid marriage, one cannot presume, even if both parties belonged to the same community, that the man living with the widow was legally married to her.

Krishnamurthi and *T. V. Chellapathy Rao* for Appellant.

P. Somasundaram and *P. Suryanarayana* for Respondent.

K.S.

King and Shahab-ud-din, JJ.
17th January, 1944.

Public Prosecutor *v.* Velayudha Nadar.
Crl. App. No. 822 of 1943.

Penal Code (XLV of 1860), *section* 300, *second clause—Person inflicting injury—When can be deemed to have known that injury was likely to cause death.*

When the deceased had cut certain trees and was removing them the accused objected to the removal and cut the deceased with an aruval first on the neck and then on the head. The deceased sustained a gaping incised wound in the middle of the back of the neck and a vertical gaping incised wound in the temporal region of the scalp which resulted in a fissured fracture. He, however, was progressing well in the hospital till one day owing to the effusion of blood in the brain he had fits and died. The doctor who held the postmortem deposed that the hemorrhage was due to some exertion or excitement. In his opinion the injuries were likely to cause death; but it was not elicited from him whether the hemorrhage that resulted in the death of the deceased was the usual or probable consequence of the fissured fracture caused by the blow dealt on the head. It was contended by the prosecution that the case came under the second clause to section 300 of the Penal Code and that the accused must be deemed to have known that the injury which he inflicted was likely to cause the death of the deceased.

Held: Such an inference cannot be drawn as it had not been elicited from the doctor that the hemorrhage in the brain could ordinarily be expected from the injuries. It is not unreasonable in the present case to infer that the hemorrhage was an unusual occurrence which could not have been foreseen. Accordingly the conviction of the accused for culpable homicide not amounting to murder is proper.

The Assistant Public Prosecutor (*N. Somasundaram*) for the Appellant.

C. A. Muhammad Ibrahim for the Respondent.

K.S.

N R C

The Chief Justice and Lakshmana Rao, J.
19th January, 1944.

Sriramachandramurthy *v.* Venkataramanayya.
S.A. No. 1463 of 1942.

Civil Procedure Code (V of 1908), section 11, Explanation VI—Applicability—Suit by ostensible reversioners of Hindu widow questioning validity of gift by widow—If can be regarded as representing the subsequently adopted son—Subsequent suit by adopted son —Not barred by res judicata.

On adoption, under the Hindu law, the adopted son dispossesses the widow and becomes the absolute owner of his father's estate. His rights date back to the death of the person to whom he is adopted as a son and he dispossesses the person who holds the property.

(1943) 2 M.L.J. 599 (P.C.), referred to.

Where the ostensible reversioners had filed a suit before the adoption questioning the validity of a gift by the widow they could not be regarded as representing the interest of the adopted son. The reversioners in that suit represented themselves and any one else coming after them and occupying the position of a reversioner. The adopted son does not come after them. He claims directly through his adoptive father. Accordingly a suit by the adopted son questioning the validity of the gift will not be barred by *res judicata* as explanation VI to section 11 of the Civil Procedure Code does not apply to the case.

P. Somasundaram for Appellant.

P. Satyanarayana Rao for Respondent.

K.S.

King and Shahabuddin, JJ.
20th January, 1944.

Chikati Guruvulu, *In re.*
Crl. App. No. 726 of 1943.

Penal Code (XLV of 1860), sections 300 and 325—Intention of accused only to steal jewels from a person—Violence committed to facilitate the theft—Unexpected death of victim from the violence—Offence.

Where the only intention of the accused who was charged with murder, was to steal the jewels of the deceased and the only act of violence, cutting the nostrils of the victim, which he committed was that necessary in order to facilitate theft and the death of the deceased was entirely unexpected (caused by hemorrhage resulting from the cutting of the nostrils) the conviction of the accused for the offence of murder cannot be sustained. The accused is guilty of causing grievous hurt and must be convicted of an offence under section 325 of the Penal Code.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

Accused not represented.

K.S.

Kuppuswami Ayyar, J.
26th January, 1944.

Mathayyan, *In re.*
Crl. R. C. No. 33 of 1944.
(Crl. R. P. No. 31 of 1944).

Criminal Procedure Code (V of 1898), section 164—Statement recorded under—Right of accused to get copies to facilitate cross-examination of the witness.

Where a case has been taken on file and is being tried, there ought to be no objection to the granting of a copy of a statement recorded under section 164, Code of Criminal Procedure, as it would be necessary for the cross-examination of the witness. It will be more convenient for the Court itself to grant such copies in advance as it may avoid the necessity for an adjournment on the ground that the cross-examining counsel is not posted with the facts stated in the statement recorded under section 164 of the Code of Criminal Procedure.

Where the preliminary enquiry has commenced and witnesses have been examined the decision in I.L.R. 30 Mad. 466, has no application. All that was stated there is that a person under remand is not entitled to a copy before the commencement of the preliminary enquiry.

K. V. Ramaseshan for the Accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Horwill, J.
11th January, 1944.

Krishnaswami Naicker *v.* Govindaswami Naicker.
S.A. No. 175 of 1943.

Limitation Act (*IX of* 1908), *section* 20—*Payment if towards interest—Admissibility of external evidence.*

The reference to writing in section 20, Limitation Act, only requires that the acknowledgment of payment should be in the handwriting of, or the writing should be signed by, the person making the payment that is the whole of the contract need not be in writing. All that has to be in writing is an acknowledgment of the actual payment. Hence external evidence is permissible to show whether a payment has been made towards interest, or towards principal, or was merely an open payment towards a debt consisting of the principal and interest together.

T. S. Vaidyanatha Aiyar for Appellant.

P. V. Rajamannar and *K. Subba Rao* for Respondent.

V.S.

Horwill, J.
13th January, 1944.

The Madras Provincial Government represented by the Collector of Godavari *v.* Yalamanchili Satyanarayanamurthy.
S.A. No. 367 of 1943.

Proprietary Estates Village Service Act (*II of* 1894), *sections* 11 *and* 13—*Senior proprietor's nomination of a deputy to a minor—Reversal by Revenue Divisional Officer and appointment of a different person—Interference by Civil Court.*

No Civil Court can reverse an administrative order of a Revenue Divisional Officer unless the officer acted *mala fide* or in gross contravention of the rules which he was bound to follow. A Civil Court cannot consider in detail the merits and demerits of the recommendations of the proprietor and of the Divisional Officer. If the Divisional Officer substantially followed the rules his order cannot be interfered with.

The Government Pleader (*K. Kuttikrishna Menon*) for Appellant.

P. Somasundaram and *V. Suryanarayana* for Respondent.

V.S.

Horwill, J.
19th January, 1944.

K. V. Madhavai Kutti Amma *v.* B. S. Thirupurantaka Mudaliar and another.
A.A.A. No. 171 of 1943.

Constructive res judicata—*Execution—Failure of judgment-debtor to raise objection based on Order* 34, *rule* 14, *Civil Procedure Code, prior to sale—Such objection cannot be raised in an application to set aside the sale prior to its confirmation.*

There was an usufructuary mortgage and a lease back for a stipulated rent. Owing to default in payment of the rent a suit on the lease was filed and a decree obtained. In execution of the decree though notices were sent to judgment-debtor for settlement of proclamation she failed to appeal. But later on she appeared and requested for a postponement of the sale waiving fresh proclamation. Time was granted but on the adjourned date she asked for time once again. It was refused and the sale was held. She then applied to set aside the sale prior to its confirmation on the ground that it infringed the provisions of Order 34, rule 14, Civil Procedure Code. On a contention that she was barred from raising it,

Held: The order for sale is a judicial one and when the judgment-debtor appeared in Court at that time she knew that the sale was about to take place. The objection that it ought not to be held because it infringed the provisions of Order 34, rule 14, should have been put forward before the sale was actually held. As she did not do so she must be held to have waived this objection and the principle of constructive *res judicata* would apply and it cannot be raised in the application to set aside the sale prior to its confirmation.

K. Kuttikrishna Menon and *K. P. Raman Menon* for Appellant.

D. A. Krishna Variar for Respondent.

V.S.

Horwill, J.
21st January, 1944.

V. C. Ravi Varma Rajah *v.* The Canara Industrial and Banking Syndicate.
A.A.A.O. No. 170 of 1943.

Civil Procedure Code (*V of* 1908), *section* 51 *proviso—Non-compliance with—Legality of order of arrest.*

A petition to arrest a judgment-debtor was adjourned from time to time and finally to a particular date to enable the judgment-debtor to file his petition in insolvency. On the said adjourned day the judgment-debtor neither appeared nor was any petition in insolvency filed by him. The Court thereupon ordered the arrest of the judgment-debtor.

Held: Though the Court was at perfect liberty to order arrest, the requirements of section 51, Civil Procedure Code, cannot be dispensed with. The Court has to record its reasons for being satisfied that at least one of the four conditions mentioned in the proviso to section 51 is satisfied before it orders arrest. As the Court failed to observe this the order of arrest should be set aside.

A. Achuthan Nambiar for Appellant.

A. Narayana Pai for Respondent.

V.S.

Happell, J.
21st January, 1944.

Thangachami Chettiar *v.* Minor Kanagasabapathi and others.

Hindu Law—Suit on promissory note against father and sons—Decree against father alone, the sons being exonerated—Partition between father and sons thereafter—Properties of both father and sons if liable to attachment in execution.

Where a suit on a promissory note against the father and sons is decreed against the father alone, the sons being exonerated, their properties could be attached in execution of the decree even though a partition had been effected between the father and sons in the interval between the date of the decree and the proceedings in execution.

Doraiswami v. *Nagaswami,* A.I.R. 1929 Mad. 898, followed.

T. L. Venkatarama Ayyar for Appellant.

B. Pocker for Respondent.

V.S.

Bell, J.
28th January, 1944.

Pillarisetti Ranga Rao and others *v.* The Panchayat Board of Tadepallegudem.
C.R.Ps. Nos. 1734 of 1942 and 72 and 73 of 1943.

Madras Local Boards Act (XIV of 1920), *section* 184*—User within the meaning of —Buses halting at bus stand en route their destination—Liability to pay fees.*

If buses enter or remain for however short a period for the purpose of halting or landing and taking up passengers on a bus stand situate en route their destination and maintained in accordance with section 184 of the Madras Local Boards Act, that is user within the meaning of the section and they are liable to pay the prescribed fee.

G. Balaparameswari Rao for Petitioners.

P. Satyanarayana Rao for Respondent.

V.S.

Kuppuswami Ayyar, J.
2nd February, 1944.

Pyarelal Purushotama Das Gupta *v.* Mohammad Abdulla.
Crl.R.C. No. 942 and 955 of 1943.
(Crl.R.P. No. 885 and 898 of 1943).

Madras Prevention of Adulteration Act (1918), *section* 5 (1) (b)*—Sale of tinned powders described as 'Sardar Indian Chicory' and 'Indian Chicory'—Tins found to contain only fried and ground Illupa or Mahua flowers—Offence not made out.*

Tins containing powder made out of Illupai or Mahua flowers only, were labelled and sold as 'Sardar Indian Chicory' and 'Indian Chicory'. On being charged under section 5 (1) (*b*) of the Madras Prevention of Adulteration Act,

Held: Merely because a particular stuff is described by a name part of which, was the name of another root, and when the facts that the contents were made of that root was negatived by the use of the word 'Indian' before the word 'chicory' to indicate that it was something indigenous and not foreign, it could not be said that there was any representation that its contents were made of *cichorium intybus* a root of a plant grown in Europe and the accused are therefore not guilty of an offence under section 5 (1) (*b*) of the Act.

V. Rajagopala Mudaliar for *P. Muthukumaraswami Mudaliar* for Petitioners.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

V.S.

Horwill, J. Nagarathinammal *v.* Visvanathan.
18th January, 1944. **S.A. No. 276 of 1943.**

Mandatory injunction—Interference with light and air of dwelling house—Damages if a proper relief—Creation of alternative sources of light and air.

A new house was built by defendant leaving a space of 2 feet from the plaintiff's southern wall and defendant's northern wall rose to a height of 9 feet and 4¾ feet respectively above the edges of the plaintiff's windows. On a claim for a mandatory injunction for the removal of the wall,

Held: The erection of the new wall had rendered the koodam of the house of the plaintiff materially less comfortable. No sum of money could reasonably compensate the plaintiff for having to live with his family in a house so rendered uncomfortable by the defendant's action. It cannot be suggested that the plaintiff should carry out structural alterations in order to afford additional light of which he has been wrongfully deprived by the defendant and the plaintiff is entitled to the relief claimed.

K. Rajah Aiyar and *V. Seshadri* for Appellant.

V. Ramaswami Aiyar for Respondent.

V.S.

Wadsworth and Patanjali Sastri, JJ. T. S. Rajam and another *v.* Pankajam
19th January, 1944. Ammal and another.
Appeal No. 399 of 1942.

Succession Act (XXXIX of 1925), *section* 141—*Applicability—Prohibition not confined to cases in which bequest is to an executor as such—Infructuous attempt to take an inventory followed by renunciation of executorship—Not a manifestation of an intention to act as executor.*

A nephew was appointed an executor and a bequest was made to him under the will. He renounced his executorship a few days after being obstructed in his attempt to take an inventory of the articles of the deceased. On the question of the applicability of section 141, Succession Act, to his case,

Held: The words of section 141 are very clear. The section says "bequeathed to a person who is named an executor" not "bequeathed to an executor". It is therefore impossible to contend that the prohibition applies only to cases in which the bequest is to an executor as such. It clearly extends to any bequest whatever be the reason for which it is made, provided the legatee is named an executor. Such an act as an attempt to take an inventory which failed, followed practically as part of the same transaction by renunciation of the executorship cannot be deemed to be a manifestation of an intention to act as an executor within the meaning of the section.

T. R. Venkatarama Sastri and *S. Rajaraman* for Appellants.

N. Rajagopala Ayyangar for Respondents.

V.S.

Horwill, J. Pookkottill Sankaran Vaidiar *v.* Calicut Bank and others.
27th January, 1944. **A.A.A.O. No. 169 of 1943.**

Limitation Act (IX of 1908), *Article* 182 (5)—*Step in aid of execution—Application to the transmitting court after the transmission of the decree—Absence of prayer for simultaneous execution.*

A transmitting court still retains jurisdiction to execute a decree that has been transmitted. The fact that the decree-holder failed to ask such a court expressly to exercise its jurisdiction to execute his decree simultaneously with the transferee court could not make the execution application thereby fail to be a step-in-aid of execution.

M. C. Sridharan for Appellant.

R. Rajeswara Rao for *John and Row* for Respondents.

V.S.

Horwill, J. Ramaswami Aiyar and others *v.* Muthayya Velalar.
28th January, 1944. **A.A.A.O. No. 77 of 1943.**

Civil Procedure Code (V of 1908), *Order* 21, *rule* 16—*Assignment in writing—Decree obtained by managing member—Subsequent partition—Partition list showing decree as falling to another member—Right of latter to apply under Order* 21, *rule* 16.

Where a decree obtained by a managing member fell to the share of another member at a partition in the family and it was so shown in the partition list subsequently drawn up, on an application supported by an affidavit by the latter under Order 21, rule 16,

Held: Either the partition list or the affidavit would be sufficient to operate as an 'assignment in writing' within the meaning of Order 21, rule 16, Civil Procedure Code.

K. V. Ramachandra Aiyar for Appellants.

R. Ramamurthi Aiyar for Respondent.

V.S.

Wadsworth, J. Dwijapada Das *v.* Bellary Mathuramma.
28th January, 1944. **C.R.P. No. 427 of 1942.**

Executing Court—Power to refuse execution—Limits—Application of Madras Act IV of 1938 *to decree passed outside the presidency.*

The power of an executing court to refuse execution is limited to cases in which the decree can be regarded as a nullity. An executing court in the Madras Presidency has no power to apply Madras Act IV of 1938 in such a way as to whittle down a decree passed outside the presidency. Nor is it within the power of the executing court to refuse to execute a decree because the decree was obtained by a trick in getting the promissory note on which it was passed assigned to some one outside the Presidency to evade the operation of Madras Act IV of 1938.

T. V. Bhagavat and *B. V. Ramanarasu* for Petitioner.

K. S. Jayaram for Respondent.

V.S.

Happell, J. V. R. Narasimha Rao *v.* Narasimha Rao and others.

28th January, 1944. **S.A. No. 111 of 1943.**

Trusts Act (II of 1882), section 88—Applicability—Advocate purchasing in execution sale property which his own clients had also attached—Obtaining of pecuniary advantage—Property to be conveyed to the clients.

An advocate purchased in execution sale certain property which his own clients in another suit had also attached. In a suit by those clients for the conveyance to them of the property so bought,

Held: The advocate stood in a fiduciary relation to the plaintiffs which bound him to protect their interests. By himself purchasing the property in execution of another decree, the advocate had entered into dealings under circumstances in which his own interests were or might be adverse to those of his clients, the plaintiffs. As it was found that the defendant had in fact gained for himself a pecuniary advantage, section 88 of the Trusts Act applied and the property must be conveyed to the plaintiffs.

T. V. Muthukrishna Aiyar for Appellant.

S. Ramachandra Aiyar for Respondent.

V.S.

King and Shahab-ud-din, JJ. Palaniappa Chettiar *v.* L.P.L.P. Narayanan Chettiar and another.

28th January, 1943. **App. No. 2 of 1943.**

Civil Procedure Code (V of 1908), section 13—Directly adjudicated upon—Positive discussion of relevant evidence, not necessary.

It cannot be contended that in order for any matter to be 'directly adjudicated upon' there must be a positive discussion of evidence relating to that matter. If any claim is made by any party and subsequently abandoned at the trial of a suit and if the decree in the suit necessarily implies that the claim has not met with acceptance at the hands of the court, then the court must be deemed to have directly adjudicated against it, and its decision is conclusive under the provisions of section 13 of the Civil Procedure Code.

B. Sitarama Rao and *T. Krishna Rao* for Appellant.

K. V. Krishnaswami Aiyar and *R. Ramasubbu Aiyar* for Respondent.

V.S.

Happell, J. P. L. Rangiah Chetty *v.* Sha Jasraj Chunilal.

2nd February, 1944. **A.A.O. No. 196 of 1943.**

Contract—Breach—Claim for damages on wrong basis—Relief on right basis can be given.

Where in a suit for damages for breach of contract to purchase yarn, damages are claimed calculated on the difference between the re-sale price and contract price, if it is found there was a breach, the plaintiff could be given a decree for damages calculated on the proper basis that is, the difference between the market price on the date of the breach and the contract rate.

K. V. Ramachandra Aiyar for Appellant.

A. C. Sampath Aiyangar for Respondent.

V.S.

Kuppuswami Ayyar, J. Pogolu Achyutharamayya *v.* Thimmaraju Ramamma.

2nd February, 1944. **A.A.A.O. No. 191 of 1943.**

Execution sale—Validity—Sale held in spite of judgment-debtor's application for stay of sale on the ground of his having filed a petition before the Debt Conciliation Board.

If a petition is filed before the Debt Conciliation Board, even though information thereof is not given to the executing Court, the sale if held is one held without jurisdiction and has to be set aside. If a petition is presented to the executing court on the date of the sale and if the person who presented it also filed an affidavit accompanying the petition for stay, on the ground that he had presented a petition to the Debt Conciliation Board and no counter affidavit is filed, it could not be said that it is not enough evidence to show that the petition must have been filed before the sale was knocked down.

M. Appa Rao for Appellant.

K. Kameswara Rao for Respondent.

V.S.

Mockett, J. Muhamad *v.* Mattara Athan.
21st January, 1944. **C.R.P. No. 78 of 1943.**

Civil Procedure Code (V of 1908), *Order* 47, *rule* 1—*Powers of review—Not to be used to recall decision and substitute another unless the grounds required by Order* 47, *rule* 1 *are present—No inherent power to review unless order was without jurisdiction.*

Unless any of the grounds required by Order 47, rule 1, Civil Procedure Code are present, the Court has no power to review its orders. The Court has no inherent power to review its own decisions unless passed without jurisdiction. It was never intended that a Court should have power just because it changes its mind to recall its decision, set it aside and substitute another decision. 37 M.L.J. 162, relied on. I.L.R. 55 Bom. 368, doubted.

N. R. Sesha Aiyar for Petitioner.

K. Kuttikrishna Menon and *S. Venkatachala Sastri* for Respondent.

K.S.

[F.B.]

The Chief Justice, Lakshmana Rao and Krishnaswami Ayyangar, JJ. The Catholic Bank, Ltd., Mangalore *v.* F. P. C. Albuquerque.
25th January, 1944. **A.A.O. No. 173 of 1942.**

Companies Act (VII of 1913), *section* 152—*Scope and effect—Arbitration in which limited liability company is concerned if confined to provisions of the Arbitration Act.*

On the question whether section 152 of the Companies Act before its amendment by the Arbitration Act, 1940, had the effect of confining arbitration in which a limited liability company was concerned to an arbitration under the Arbitration Act or whether it left the company free to follow any of the courses contemplated by the Civil Procedure Code,

Held: After the enactment of the Indian Companies Act 1913, and before the Arbitration Act, 1940, came into force a company could only enter into an arbitration under the provisions of the Indian Arbitration Act, 1899, and consequently companies were outside the scope of Schedule II of the Code of Civil Procedure.

I.L.R. (1940) 1 Cal. 358, followed.
(1943) 2 M.L.J. 489: 56 L.W. 537, not approved.
I.L.R. 17 Lah. 722, not followed.

B. Sitarama Rao and *S. J. S. Fernandez* for Appellant.

K. Rajah Aiyar, M. L. Nayak, Pais, Lobo and *Alvares* for Respondent.

V.S.

Horwill, J. Moorayya *v.* Suryanarayana.
25th January, 1944. **A.A.A.O. No. 55 of 1943.**

Limitation Act (IX of 1908), *Article* 182 (5)—*Prior application for execution—Dismissal for non-payment of Court-fee—Saves limitation—Application one in accordance with law.*

The dismissal of a prior execution petition for non-payment of Court-fee is a final order. The payment of Court-fee is not a condition precedent to the filing of the execution application. An application can be filed and Court-fee paid at any time prior to execution. Any subsequent default in paying the Court-fee cannot affect the validity of the application itself. The application is therefore one in accordance with law and the order dismissing it is a 'final order' which will save a subsequent application for execution from the bar of limitation.

I.L.R. 30 Mad. 28, applied.
I.L.R. 34 Bom. 189, relied on.

V. Parthasarathi for Appellant.

P. Satyanarayana Rao for Respondent.

K.S.

Mockett and Bell, JJ. Muhammed Haneef Sahib and others *v.* Board of Trustees Jumma Masjid, Adoni.
3rd February, 1944. **A.A.O. No. 576 of 1942.**

Civil Procedure Code (V of 1908), *section* 92—*Scheme decree—Liberty to apply to the Court for directions—Clause providing for—When valid.*

If in a decree for a scheme framed under section 92, Civil Procedure Code liberty is given to persons to apply to the Court for directions merely to carry out the scheme already settled such reservation of liberty in the decree will be *intra vires* if the assistance of the Court can be given without offending section 92; but where liberty is given to apply to the Court for alteration or modification of the scheme such reservation is *ultra vires* as offending section 92.

Authorities considered and I.L.R. 51 Mad. 31 (F.B.), followed.

Basheer Ahmed Sayeed for Appellant.

A. Bhujanga Rao and *D. R. Krishna Rao* for Respondent.

K.S.

N R C

Happell, J. Kuppammal *v.* Thangamuthu Pandaram.
3rd February, 1944. **S.A. No. 148 of 1943.**

Husband and wife—Wife suing for maintenance on the ground that she was chaste—Husband proving that she had lived an immoral life—Wife cannot claim maintenance on the ground that husband should also prove that she was living an immoral life when she filed the suit.

A wife after suing for maintenance on the ground that she was a chaste woman and that she had left her husband owing to his misconduct is not entitled, when the husband proved that she had lived an immoral life and that it was not his fault that she had left him, to claim maintenance on the ground that the husband must also prove that she was living an immoral life when she filed the suit. (1939) 2 M.L.J. 294, relied on. 24 I.C. 390 (M.), distinguished.

K. S. Ramamurthi for Appellant.
Ch. Raghava Rao for Respondent.
K.S.

Horwill, J. Public Prosecutor *v.* Bavuddin Sahib.
4th February, 1944. **Crl. App. No. 934 of 1943.**

Defence of India Rules (1939), *rule* 81 (4)—*Food Grains Control Order—Rule* 3—*Scope—Whether sale or storage in wholesale quantities prohibited—Storage in wholesale quantities if to be for fulfilling a contract to constitute an offence.*

Criminal Procedure Code (*V of* 1898), *section* 164—*Confessions made otherwise than to a magistrate—Admissibility—Failure to warn that it might be used against confessor—Effect.*

Confessions made otherwise than to a Magistrate under section 164, Criminal Procedure Code are always admissible in evidence, provided that they are made without inducement, threat or promise. A confession recorded by the Sales Tax Officer is admissible even though that officer did not warn the accused that it might be used against him.

It is uncertain whether by the Food Grains Control Order storage in wholesale quantities was not permitted without a license or whether what was prohibited was merely sale in wholesale quantities. The fact that section 2 (*d*) spoke of sale in wholesale quantities rather favours the view that it is only the sale and not storage that is prohibited. In any event, storage for sale is not an 'undertaking'; so that if storage for sale in wholesale quantities is to be an offence, it must be proved that it was stored for the purpose of fulfilling a contract. Accordingly where the accumulation of grain in excess of 20 maunds was accidental, although the accused intended selling the same, it would not be an offence.

The Public Prosecutor (*V. L. Ethiraj*) in person.
A. S. Sivakaminathan for Respondent.
K.S.

Kuppuswami Ayyar, J. Uduman Tharaganar, *In re.*
10th February, 1944. **Crl. R.C. No. 986 of 1943.**
(Crl. R. P. No. 928 of 1943).

Defence of India Rules (1939), *rule* 81 (4)—*Food Grains Control Order—Notification prohibiting storage of rice for sale in wholesale quantities—Contravention—Gist of offence.*

The charge against the accused was that he stored 31½ bags of rice (each bag containing 45 measures weighing two maunds). It was urged that the words "storage for sale, in wholesale quantities were not defined in the Defence of India Rules as they stood on the date of the offence and that rule 3 of the notification prohibited only storage for sale in wholesale quantities and not storage in wholesale quantities for purposes of sale. [The expression "storage for sale in wholesale quantities" has been subsequently defined as meaning storage for purposes of sale, whether the sale is in wholesale quantities or in retail.] On a construction of the expression even apart from the subsequent definition,

Held, that the phrase "in wholesale quantities" govern the words purchase, sale, and storage. Therefore it was also the storage in wholesale quantities for purposes of sale that was prohibited. The accused having stored more than 20 maunds (which is defined as the wholesale quantity) was guilty.

Held, further: It cannot be said that it is only storage in connection with a contract entered into before the storage that was prohibited. An 'undertaking' might be a unilateral act. If a person undertakes to trade and if he stores food grains in wholesale quantities for sale in future under contracts to be entered into in the future, he will still be guilty of the offence punishable under rule 3 of the notification.

Opinion of *Horwill, J.*, in *Public Prosecutor* v. *Bavuddin Sahib,* C.A. No. 934 of 1943, dissented from.

K. E. Rajagopalachari for Accused.
The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.
K.S.

Mockett and Bell, JJ. Somasundaram Chettiar *v.* Kannammai Achi.
24th January, 1944. **A.A.O. No. 328 of 1943.**

Civil Procedure Code (V of 1908), *Order XL—Scope—Application alleging wilful default or gross negligence and conversion against receiver—Reference to commissioner for enquiry improper—Appropriate procedure.*

Order XL of the Civil Procedure Code, contemplates an enquiry in cases of ordinary questions of accounts and also cases of wilful default or gross negligence; but it is not designed to cover what in substance is a case of conversion against the receiver. In such a case the matter should be referred to a separate suit. 5 C.W.N. 223; I.L.R. 53 Cal. 881 and 40 C.W.N. 479, distinguished.

Where an application for accounts levels serious charges of wilful default and gross negligence against a receiver it is wrong to refer the enquiry into the charges to a commissioner, *Manicka Mudaliar* v. *Andalammal* (1940) 1 M.L.J. 356: I.L.R. (1940) Mad. 636, relied on.

If the charge was merely one of default the matter could be enquired into and decided by the Court. But where the charge is virtually one of conversion the matter should be referred to a suit.

B. Sitarama Rao and *T. S. Vaidyanatha Aiyar* for Appellants.

C. Padmanabha Aiyangar, A. Sundaram Aiyar, M. S. Krishnamurthi Sastri and *T. K. Sundararaman* for Respondents.

K.S.

Wadsworth and Patanjali Sastri, JJ. Hanumantha Rao *v.* Ramachandrayya.
31st January, 1944. **Appeals Nos. 79 and 80 of 1942.**

Evidence Act (I of 1872), *sections* 112 *and* 118 *to* 120*—Issue as to paternity—Evidence of either parent as to non-access at the time when conception could have taken place—Admissibility—Section* 112*—Child born during coverture—Presumption—Evidence of non-access—"Access"—Meaning.*

There is nothing in the Evidence Act, which debars a husband from giving evidence of non-access to his wife, even though the effect of such evidence may tend to prove that a child born during the continuance of the marriage to the wife is illegitimate.

A husband or wife of any party to a suit is a competent witness under section 120 of the Evidence Act and to find out what evidence a competent witness can give, regard must be had to the general rules of relevancy and admissibility as laid down in the Evidence Act subject only to such special exceptions as the Indian statute law embodies.

1924 A.C. 687, considered; I.L.R. 62 Cal. 108, not approved; 25 M.L.J. 594: I.L.R. 38. Mad. 466 (F.B.), relied on.

The law governing proof of legitimacy of a child born during the continuance of a marriage is laid down in section 112 of the Evidence Act. The fact that the child was born during the continuance of a valid marriage between the mother of the child and her husband is conclusive proof that the child is a legitimate child of the husband, unless it can be shown that the parties to the marriage had no access to each other at any time when the child could have been begotten. The word "access" in section 112 of the Evidence Act, does not mean actual sexual intercourse and the only way in which the presumption under that section can be displaced is by proof that the parties to the marriage had no opportunity for intercourse with each other at any time when the child could have been begotten: I.L.R. 12 Rang. 243 (P.C.): (1943) 2 M.L.J. 108: 56 L.W. 383 and 54 L.W. 411, relied on 61 M.L.J. 878 and 66 M.L.J. 279, held to be incorrect.

Ch. Raghava Rao for Appellant in Appeal No. 79 of 1942 and Respondent in Appeal No. 80 of 1942.

S. Panchapakesa Sastri and *G. C. Venkatasubba Rao* for Appellant in Appeal No. 80 of 1942 and Respondent in Appeal No. 79 of 1942.

V. Subramaniam for Respondent in both.

K.S.

Happell, J. Chingleput Co-operative Urban Bank, Ltd. *v.* Thirupurambal Ammal.
9th February, 1944. **S.A. No. 250 of 1943.**

Mortgage—Award on by Registrar of Co-operative Societies in favour of a co-operative society—Award not executed and allowed to become barred by limitation—Subsequent suit even against persons not impleaded in the award—Proceedings barred.

A Co-operative Bank having already obtained an award from the Registrar of co-operative societies against the mortgagor for the amount due under the mortgage cannot file a second suit on the mortgage. Once an award has been obtained, the cause of action becomes merged in the award and the only remedy is to enforce it by execution. But a mortgagee who has not executed his decree (or award as in the present case which can be treated on the same footing) and allowed it to become barred cannot bring a second suit even against a person not impleaded in the first. His cause of action is the same. It is founded on the mortgage; and the mortgage having been extinguished, no fresh suit will lie.

N R C

V. Ramaswami Aiyar for Appellant.
P. V. Rajamannar and *K. Subba Rao* for Respondent.
K.S.

Horwill, J. Paramasivan Nambudripad *v.* Subramania Iyer.
9th February, 1944. S.A. Nos. 8 to 10 and 131 of 1943.

Malabar Tenancy Act (XIV of 1930), *section* 51 (2)—*Scope—Not applicable for estimating damages for breach of contract.*

The actual words of section 51 (2) of the Malabar Tenancy Act, only lay down a commutation rate where rent, michavaram or renewal fee has to be fixed. The sub-section could not have been intended to apply to estimating damages for breach of contract. Where under a contract rent is to be paid in kind section 52, requires it to be delivered at the landlord's granary. If the tenant does not do so, then the landlord would be entitled to the value in money of the produce at the time of the breach. Section 51 of the Malabar Tenancy Act cannot be applied for assessing the amount of damages.

S. Venkatachala Sastri for Appellant.
T. V. Muthukrishna Aiyar and *K. P. Ramakrishna Aiyar* for Respondent.
K.S.

Kuppuswami Ayyar, J. Abdul Kalick Sahib *v.* Abdul Kayyum Sahib.
9th February, 1944. A.A.A.O. No. 19 of 1943.

Practice—Attachment before judgment—Judgment-debtor having no title to the property—Subsequent acquisition of interest by debtor—Effect.

It cannot be said that because there had been already an attachment of certain property as the property of some of the defendants also, when in fact they had absolutely no interest, the subsequent acquisition of interest by them would entitle the decree-holder to avail himself of the earlier attachment. If the subsequent application is made more than twelve years after the passing of the decree, limitation would not be saved as against the defendants who had no interest in the property at the time the earlier application for attachment was made.

I.L.R. 18 Cal. 164, 176 and 177, distinguished.

K. V. Ramachandra Aiyar for Appellant.
S. V. Venugopalachari for Respondent.
K.S.

Horwill, J. Mahalakshmamma *v.* Viraraghavulu.
10th February, 1944. S.A. No. 363 of 1943.

Civil Procedure Code (V of 1908), *section* 73—*If restricted to persons who are eo* nominee *judgment-debtors.*

The appellant held a personal decree against certain judgment-debtors, the decree being one on a promissory note executed by the judgment-debtors in renewal of a debt of the last male owner whose properties they had inherited. The respondent had obtained a decree against the assets of the last male holder in the hands of the same judgment-debtors. The respondent applied for rateable distribution of the assets realised in execution of the appellant's decree.

Held: The decree of the respondent is certainly against the judgment-debtors' own property, though its application is limited to the estate received by the judgment-debtors from the original debtor. As both parties were proceeding against that very estate there is no reason why section 73 should not be applied. The situation would have been different if the appellant sought to execute his decree against property of the judgment-debtors which had not come to them from the deceased debtor.

69 M.L.J. 711, referred to.

V. Subramaniam for Appellant.
M. S. Ramachandra Rao for Respondent.
K.S.

Kuppuswami Ayyar, J. Narayana Rao *v.* Venkataseshayya Chetty.
16th February, 1944. A.A.A.O. No. 120 of 1943.

Civil Procedure Code (V of 1908), *Order* 21, *rule* 90—*Judgment-debtor waiving fresh proclamation and praying that sale might be held a month later with Rs.* 2,500 *as upset price—Sale subsequently held—Objection as to wrong description in sale proclamation and low valuation—If can be raised to have the sale set aside.*

Where there was an incorrect description in the sale proclamation, namely, that there was one house only while there were three houses and further the property was undervalued but the judgment-debtor appeared and waived fresh proclamation and only prayed that the sale might be held a month later with Rs. 2,500 as upset price and the sale was accordingly held it will not be open to the judgment-debtor to object to the sale on the ground that there was an incorrect description and that the upset price was low. He is estopped and not entitled to have the sale set aside on those grounds, *Arunachalam v. Arunachalam*, I.L.R. 12 Mad. 19 (P.C.), followed.

K. S. Jayaram for Appellant.
K. Srinivasa Rao for Respondent.
K.S.

Wadsworth and Patanjali Sastri, JJ. Sarojinidevi *v.* Krishna Anjaneya Subramaniyam.
4th February, 1944. **Appeal Nos. 311 and 380 of 1942.**

Hindu Women's Rights to Property Act (*XVIII of* 1937)—*Applicability—Mango grove—If "agricultural land" to which Act has no application—Government of India Act,* 1935, *Schedule VII —Lists II and III—Entries—"Agriculture"—Meaning—Widow—Right to maintenance—Quantum.*

For the purposes of the relevant entries in Lists II and III of Schedule VII of the Constitution Act the expression "agricultural lands" must be taken to include lands which are used or are capable of being used for raising any valuable plants or trees or for any other purpose of husbandry. It follows that a mango grove forming part of an estate is "agricultural land" in respect of which the Hindu Women's Rights to Property Act, 1937, does not operate to regulate succession.

[Decisions under various enactments as to the meaning of "agricultural land," discussed].

A widow is entitled to maintenance notwithstanding her right under the Act to a share in the non-agricultural part of the family estate which however will be taken into account in determining the amount payable as maintenance. (1943) 1 M.L.J. 235, approved.

Ch. Raghava Rao for Appellant in Appeal No. 311 of 1942 and for Respondent in Appeal No. 380 of 1942.

K. Bhimasankaram for Respondents in Appeal No. 311 of 1942 and for Appellant in Appeal No. 380 of 1942.

K.S.

Happell, J. Zamindar of Poravipalayam *v.* Ramaswami Goundar.
4th February, 1944. **A.A.O. No. 323 of 1943.**

Civil Procedure Code (*V of* 1908), *section* 9—*Right to celebrate the annual worship of a deity in a temple—If a civil right in respect of which suit for injunction is maintainable in a Civil Court.*

Certain villagers sued for a permanent injunction restraining the defendants (the zamindar and a villager of an adjoining village) from celebrating the annual worship of the deity Makali Amman of the village during that year or at any future time. The defendants' case was that it was the Zamindar who had the right to perform the ceremonies in the temple and that the plaintiffs had not the right which they claimed. On a question as to the cognizability of the dispute by the Civil Court,

Held: Though it may not always be easy to draw the line between what is merely a part of the ritual of the worship and what is a right to conduct the worship itself, in the present case there is a straightforward claim to have the right to perform the annual worship of the Goddess which is enforceable by a civil suit.

3 L.W. 512 and 31 M.L.J. 758, relied on.

(1938) 1 M.L.J. 174; 41 L.W. 752; 120 I.C. 874; (1939) 1 M.L.J. 199; (1939) 1 M.L.J. 124; 14 M.L.J. 171; I.L.R. 28 Mad. 23 and 9 M.L J. 355, referred to and discussed.

S. S. Ramachandra Aiyar for Appellant.

T. V. Ramanatha Aiyar for Respondent.

K.S.

Horwill, J. Noor Shah Maracair *v.* Magadoon Naina Maracair.
8th February, 1944. **S.A. No. 357 of 1943.**

Limitation Act (*IX of* 1908), *Article* 89—*Applicability—Trust empowering four of the members of a family just divided to manage some of the properties set apart for winding up a business and paying debts—Claim by members for balance after payment of debts—Limitation.*

A family of Mahomedans divided the greater part of their properties, but left some items undivided in order that they might make arrangements for winding up a business and paying their debts. They executed a deed, described as a trust deed, empowering four of the members of the family to manage the properties thus left undivided and to do what was necessary for the discharge of the debts. The deed further provided that the four members should furnish accounts and finally distribute the proceeds according to the shares of the various members under the Mahomedan law. In a suit by certain members for an account and for their share in the produce of the properties thus left joint.

Held: (*i*) The suit, having been filed more than three years after the agency was terminated, was barred under Article 89 of the Limitation Act; (*ii*) The deed though described as a trust deed could not be a trust deed as there was no conveyance of the properties to the persons who were to manage them. It is immaterial whether the persons who are to manage the properties are strangers or members of the family.

51 I.C. 253, relied on; 1937 M.W.N. 368, distinguished.

N R C

(*iii*) It cannot be said that the agents were constructive trustees. The possession of the manager must be referred to their agency under the deed and not to their rights as co-owners.

(*iv*) A clause in a deed of agency requiring the agent to give to the principal what was due to him after he had done all else that was required of him under the deed would not prevent time from running. The position would not be changed if there were two or more principals. Limitation would begin to run from the date when the agent had completed all his duties—realising assets and paying the debts—except the return of the money to his principals.

K. Rajah Aiyar and *K. Sreenivasan* for Appellants.
Basheer Ahmed Sayeed for Respondent.

K.S.

Horwill, J.
8th February, 1944.

Venkateswarlu *v.* Hymavatamma.
S.A. No. 124 of 1943.

Promissory note—Endorsement to another person antedating it with a view to avoid the application of Madras Act (IV of 1938)*—If a forgery and a nullity.*

An endorsement on the back of a promissory note purporting to endorse the note over to the plaintiff was antedated and written merely to avoid the application of Madras Act (IV of 1938). In a suit on the note by the endorsee,

Held, that the antedating of the endorsement made it a forgery especially as the endorser made the false document with the dishonest intention of making the debtor under the note liable for an amount exceeding that which Madras Act, IV of 1938, permitted. The effect of a forged document in India is the same as in England and it has therefore no legal effect whatsoever. The forged endorsement conveyed no title on which the endorsee could sue. The principle of section 13, clause 2 of the English Bills of Exchange Act under which antedating and postdating of cheques was permissible is not applicable. The dishonest antedating will always constitute forgery.

A.I.R. 1926 Mad. 1154, considered.

M. S. Ramachandra Rao and *D. R. Krishna Rao* for Appellant.
P. Satyanarayana Rao for Respondent.

K.S.

Horwill, J.
9th February, 1944.

Vellachi *v.* Gopalan Nair,
S.A. No. 160 of 1943.

*Malabar Law—Marumakkathayam family—*Tavazhi*—Partition—Mother and some of her children—If can remain joint after disruption of the* tavazhi.

By dividing themselves off, some children cannot compel their mother to divide herself from those children who prefer to remain joint with her. This is so under the Hindu law and there is no reason why it should not be so in a Marumakkathayam family. 55 M.L.J. 208: 51 Mad. 574 and 40 L.W. 857, distinguished.

K. Kuttikrishna Menon and *A. Gopalakrishnan* for Appellants.
P. Govinda Menon for Respondents.

K.S.

Mockett, J.
10th February, 1944.

Suryaprakasa Rao *v.* Examiner of Local Fund Accounts, Madras.
A.A.O. No. 399 of 1943.

Local Boards—Order for surcharge—Necessity for notice where president is sought to be surcharged on further grounds than those in the surcharge certificate of the Examiner of Local Fund accounts.

Where the president of a Village Panchayat Board is sought to be surcharged in respect of money fraudulently converted to his own use by the Panchayat Bill Collector, it is a penal procedure and what might be described as the charge, is the surcharge certificate of the Examiner of Local Fund Accounts, wherein he sets out the ground on which the surcharge is based. Where however an item of charge was not the subject of any allegation by the Examiner of Local Fund Accounts the Court cannot pass an order for surcharge without proper notice to the person sought to be surcharged. When there is ample opportunity for the Government to give notice to the person sought to be surcharged on any further grounds on which they claimed to make him liable at the hearing of the suit he should not be made liable on a totally new charge.

V. Suryanarayana for Appellant.
The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

K.S.

Happell, J.
15th February, 1944.

Sivasubramania Mudaliar *v.* Shanmuga Rajeswara Sethupathi.
S.A. No. 282 of 1943.

Madras Estates Land Act (I of 1908)*, sections* 3 (11) *and* 77*—Suit for rent of lands on which houses had been built—Necessity for proof that land was held for agricultural purposes while the Act was in force.*

Where the land in question had been cultivable since the Madras Estates Land Act came into force but the tenant had merely chosen to build houses on it rather than to use it for agricultural purposes, he would be liable to pay rent in respect of it. The definition of "rent" in section 3 (11) of the Estates Land Act does not require that the ryot in possession should actually use the land for the purpose of agriculture. The liability to pay exists so long as his right to use it for agricultural purposes subsists and what he is bound to pay is rent. 25 M.L.J. 50, relied on.

If it is not shown at least that lands on which houses have been built had been ryoti lands at some period while the Estates Land Act had been in force the inference that the occupant had the right to use the lands for an agricultural purpose and is liable to pay "rent" for them within the definition of section 3 (11) of the Estates Land Act cannot be drawn.

(1938) 2 M.L.J. 829, referred to.

M. V. Ganapathi for Appellant.

A. C. Sampath Aiyangar for Respondent.

K.S.

Horwill, J. Audinarayana *v.* Ayyanna.
17th February, 1944. **S.A. No. 671 of 1943.**

Hindu Law—Joint family—Contract for sale of family property by manager or father—Enforceability against the minor members.

Where, as many as four adult members take part in a contract for sale of joint family property and all the minor members are represented by their fathers, it would seem *prima facie* that the contract was entered into with the individual members of the family and not with the manager.

An agreement to sell being enforceable against the manager when the purpose of the sale is binding on the family, an agreement to sell by a father could be enforced against the father if the sale were for the discharge of an antecedent debt.

P. V. Rajamannar and *K. Subba Rao* for Appellant.

V. Govindarajachari for Respondent.

K.S.

Horwill, J. Pattalamma (village Goddess of Vedapalli) represented
21st February, 1944. by Swamigadu *v.* Manikyam and others.
S.A. No. 381 of 1943.

Customary right—Practice of taking procession of the village goddess in years of pestilence through field of a private owner—Essentials for acquiring the right.

A practice should be attributed to a right only if the exercise of that practice is inconsistent with permission being granted by the owner of the land over which the practice was to carry in procession the village goddess in years of pestilence. Unless the customary right is reasonable it cannot be recognised. The practice of taking the procession through a field owned by the plaintiff in times of adversity should be attributed to the consent of the previous owner of the land, in the absence of evidence that the procession was ever conducted through the land against the wishes of the owner. Further, as such processions could be taken by the villagers in any direction they pleased it would be unreasonable to claim a right to take it through the plaintiff's land which was since being used as a garden. I.L.R. 17 All. 87, applied.

P. Satyanarayana Rao for Appellants.

C. Rama Rao for Respondents.

K.S.

Kunhi Raman, J. Brahmayya *v.* Nagireddi.
25th February, 1944. **C.R.P. No. 838 of 1943.**

Contract Act (IX of 1872), *section* 25 (3)*—Document in writing agreeing to pay a debt barred by limitation—Ignorance of executant that the debt was barred—Effect.*

If a person executed a document in writing agreeing to pay debt (which is barred by limitation), in ignorance of the fact that the debt had become barred by limitation, the provisions of section 25 (3) cannot apply and the promise under the document will be one not supported by consideration and therefore cannot be enforced.

M. S. Ramachandra Rao and *D. R. Krishna Rao* for Petitioner.

K. Kotayya for Respondent.

K.S.

Mockett and Bell, JJ. Mohammad Abdulla *v.* Corporation of Madras.
28th February, 1944. **Crl.R.C. No. 89 of 1944.**
(Crl.R.P. No. 86 of 1944).

Madras Prevention of Adulteration Act (III of 1918), *section* 12*—Action under—Production of goods seized as adulterated before Magistrate with necessary certificate—Evidence connecting goods and certificate essential.*

The Food Inspector of the Madras Corporation took action under section 12 of the Madras Prevention of Adulteration Act against a trader and seized from his shop a number of goods, and samples were taken to the Public Analyst. The Magistrate dealt with the case merely on the certificate and the goods. On revision,

Held: Though under section 12 of the Act no procedure is laid down and it would appear that all that is necessary is that the goods which were the subject of the proceedings should be produced before the Magistrate with the necessary certificate, there must be evidence to connect the goods and the certificate, and it is wrong to act merely on the certificate and the goods produced.

V. Rajagopala Mudaliar for Petitioner.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

B. Lakkappa Rai for Respondent.

K.S.

Kuppuswami Ayyar, J. Rajagopal Chettiar *v.* Arunachala Mudaliar.
28th February, 1944. **A.A.A.O. No. 242 of 1942.**

Limitation Act (IX of 1908), *Article* 182 (5)—*Execution petition returned for filing additional documents but not re-presented within time—Application to excuse delay in re-presentation—Notice to other side not essential—Excusing delay—Effect.*

If a petition should be filed for excusing the delay (in re-presentation of an execution petition returned for filing some additional documents) even though the time given for re-presentation had expired, if the delay is excused the petition will become one which has a legal existence the order on which will be a "final order" saving limitation. For such a petition to excuse the delay in re-presentation or to extend time, there is no mandatory provision directing the issue of a notice to the respondent before the delay is excused and the order extending time or excusing delay does not become one made without jurisdiction merely because of the absence of such notice. 51 M.L.J. 219=50 Mad. 67, distinguished.

N. Srinivasa Aiyangar for Appellant.

S. Thiyagaraja Aiyar and *T. N. Sundaresa Aiyar* for Respondent.

K.S.

Kuppuswami Ayyar, J. Subramania Ayyar, Petitioner.
1st March, 1944. **Crl.R.C. No. 210 of 1944.**
(Crl.R.P. No. 201 of 1944).

Criminal Trial—Destruction of records by fire pending a rehearing of an appeal as ordered on revision—Authentic copies of all the records not available—Only course is to direct a de novo *trial.*

Two accused were charged with having committed criminal breach of trust in respect of some jewels. They were convicted by the first Court but acquitted by the Joint Magistrate on appeal. On revision to the High Court the order of acquittal was reversed and the Joint Magistrate was directed to rehear the appeal. But the Joint Magistrate was not able to rehear the appeal because the records in the case had been burnt, when his Court was set fire to in August, 1942, with the result that he found himself unable to go on with the appeal in the absence of the necessary papers. Certified copies of the prosecution evidence were available but those pertaining to the defence evidence were not available. In the circumstances *held,* that the Joint Magistrate had no other course except to order a *de novo* trial. If all the certified copies were available *de novo* trial could not have been ordered.

S. Venkatesa Aiyangar for Petitioner.

K.S.

Kuppuswami Ayyar, J. Ganapathi and others—Accused.
2nd March, 1944. **Crl.R.C. No. 168 of 1944.**
(Crl.R.P. No. 159 of 1944).

Defence of India Rules—Prohibition of fishing in the vicinity of Madras harbour—Contravention—Offence—Confiscation of catamarans, and nets—Not permissible.

There is no provision in the Defence of India Rules authorising the Courts on a conviction (for fishing in the vicinity of the Madras harbour in contravention of the notification under the Defence of India rules) to order the confiscation of the catamarans, nets, etc., used by the accused.

G. Natarajan for Accused.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

K.S.

Happell, J. Jothimani *v.* Agnesis Chellathayammal.
14th February, 1944. S.A. No. 274 of 1943.

Transfer of Property Act (IV of 1882), *section* 60—*Applicability—Mortgagee purchasing portion of hypotheca from absolute purchaser from one of the mortgagors—Right to insist on redemption by other mortgagors by payment of whole amount due—limits.*

The first defendant, one of the mortgagors, sold under two sale deeds his share to a stranger undertaking to pay off the mortgage debt in respect of the share from other properties. The stranger subsequently sold the properties which he had purchased to the mortgagee himself reciting that "the entire balance due under the mortgage deed mentioned in the particulars of the receipt of money has been discharged in full through this deed". In a suit by the mortgagee to enforce the mortgage,

Held, that where the mortgagee purchases a portion of the properties from one of the mortgagors for its full value absolutely and free from the mortgage, the mortgagee is entitled to insist that the whole of the mortgage money remaining due to him should be recovered from the other properties. The mere fact that the sale was not a direct sale by one of the mortgagors to the mortgagee does not make any difference. The governing fact is that on the date of the suit the mortgagee, as far as the first defendant's share was concerned, had not only acquired the equity of redemption but had purchased it absolutely free of the mortgage. (1940) 2 M.L.J. 1003, referred to.

R. Ramamurthi for Appellant.

N. S. Sundaram for Respondent.

K.S.

Mockett, J. Puttengattil Mamu *v.* The Nedungadi Bank, Ltd.
15th February, 1944. C.R.P. No. 894 of 1943.

Madras Debt Conciliation Act (XI of 1936), *section* 25—*Procedure under—Scope—Stay of suit or proceedings—Can be ordered only once and it is immaterial as to who applies for stay.*

Section 25 of the Debt Conciliation Act says no more than that "when an application has been made to a board under section 4, any suit or other proceedings then pending before a Civil Court in respect of any debt for the settlement of which application has been made shall not be proceeded with until the board has dismissed the application". Although it is a convenient procedure no doubt, strictly there is no reason why either the judgment-debtor or the decree-holder should apply for stay. It is their duty to inform the Court of the application, and when the Court is informed, it is the duty of the Court to make a stay order.

Where on the first occasion the stay application was made by the decree-holder and after dismissal of the application for conciliation, another application for conciliation was made and the judgment-debtor made a fresh application for stay under section 25 of the Debt Conciliation Act, the second stay application cannot be granted. It is totally immaterial on whose initiative the stay order was made by the Court as in both cases it amounts to nothing more than that somebody brings to the notice of the Court the fact of the debt conciliation proceedings and if the Court is satisfied that the information is accurate, the Court then stays the execution proceedings.

(1939) 2 M.L.J. 727; (1940) 2 M.L.J. 923; (1941) 2 M.L.J. 123, relied on.

(1940) 2 M.L.J. 283, distinguished.

K. P. Raman Menon for Petitioner.

V. C. Viraraghavan for Respondent.

K.S.

Chandrasekhara Ayyar, J. Venkataramayya *v.* Atchayya.
17th February, 1944. S.A. No. 524 of 1943.

Inam—Service inam land—When can be converted into jeroyti land by agreement with landholder—Service inam lands—Partition—Validity.

What is really service inam cannot become jeroyti land by agreement with the landholder, unless it is proved that the right of resumption is with the landholder, which is possible only if the grant was a post-settlement and not a pre-settlement one.

A partition of service inam lands is not illegal or prohibited by law. All that was decided in 43 L.W. 718, was that the income from such properties could not be deemed to be joint family property available for family necessities as maintenance. On the other hand the case recognises that when the office holder dies leaving sons more than one and the service

has to be performed by all of them by turns or in any convenient manner, the emoluments could also be enjoyed by them in such manner as they may deem fit.

P. Somasundaram for Appellant.

K. Mangachary for Respondent.

K.S.

Chandrasekhara Ayyar, J.
18th February, 1944.

Kandaswamy Padayachi and others *v.* The Province of Madras (represented by the Collector of Salem) and others.
S.A. No. 427 of 1943.

Forest Act (V of 1882), section 5—Scope and construction—Resort to Civil Courts—Prohibition—Limits—Decision of Forest Settlement Officer—How far res judicata.

The provision in section 5 of the Forest Act that Civil Courts shall not be resorted to for the establishment of any right in or over any land between the dates of the publication of the notification under section 4 and of the notification under section 16, does not mean that after the notification under section 16, Civil Courts shall have jurisdiction irrespective of the question whether the rights set up are not rights which should have been advanced, for consideration by the special tribunals constituted under the Forest Act, for their determination. Where special tribunals are constituted to redress particular injuries, it is they that must be resorted to and not the Civil Courts. 11 Mad. 309 at page 313 (F.B.), considered.

Where it was decided by the Forest Settlement Officer that a particular area was sufficient for pasturage and the claim for more was not justified and the order was confirmed by the District Collector on appeal, the Settlement Officer is a Court. By the provision for an appeal against their decisions, what is *res judicata* may become *res subjudicata* and the appellate tribunal may have to hear the case once again. But Civil Courts have no appellate jurisdiction over those special tribunals and so far as they are concerned, what has been decided by those tribunals must be taken to have become *res judicata*. 12 Mad. 105; 20 Mad. 279 and 17 M.L.J. 557, relied on.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for 1st Respondent.

K.S.

[F.B.]
The Chief Justice, Mockett and Lakshmana Rao, JJ.
21st February, 1944.

Murthiraju *v.* Subbaraju.
C.R.P. No. 719 of 1943.

Civil Procedure Code (V of 1908), section 115—Scope—Decision on question as to inadequacy of court-fee—When open to revision by High Court.

A revision petition lies when a Court Subordinate to the High Court holds that the plaintiff has inadequately stamped his plaint, but a petition for revision does not lie when a defendant has unsuccessfully challenged the adequacy of the stamp affixed by the plaintiff unless a further question of jurisdiction is involved.

55 M.L.J. 345; I.L.R. 51 Mad. 664 and 56 M.L.J. 394, affirmed,

P. Suryanarayana for *P. Somasundaram* for Petitioner.

P. Satyanarayana Raju for Respondent.

K.S.

Mockett and Bell, JJ.
2nd March, 1944.

Ramayya *v.* Lakshmayya.
A.A.O. Nos. 334 to 336 of 1943.

Civil Procedure Code (V of 1908), Order 43, rule 1 (d)—Order directing deposit of costs of other side and that in default petition will stand dismissed—Final and appealable.

An order directing that the applicants "shall deposit costs as a condition precedent to restoration of suit within a fixed time and that in default the petitions will stand dismissed with costs" is final and appealable.

T. S. Rama Rao for Appellant.

P. Satyanarayana Rao for Respondent.

K.S.

Horwill, J. Audinarayana *v.* Rattamma.
8th February, 1944. **C.R.P. No. 2185 of 1941.**

Court Fees Act (*VII of* 1870), *section* 7 (iv) (a)—*Applicability—Plaintiff dispossessed from property—Suit alleging that a gift deed executed by the plaintiff was sham and nominal for screening properties from creditors—Prayer for mere declaration that plaintiff was still the owner of the property and possession—Sufficiency—Cancellation of gift deed—Not necessary.*

The plaintiff executed a sham and nominal gift deed for the purpose of screening his property from his creditors. He was subsequently dispossessed of this property and he therefore sought a declaration that he was still the owner of the property, despite the execution of the gift deed and for possession.

Held, that as the gift deed was intended to be inoperative and was not intended to be anything more than a scrap of paper it had no legal effect and did not stand in the way of the plaintiff's getting a declaration of his title and it was not necessary to pray for the cancellation of the gift deed. It was sufficient to pay court-fee as for a declaration and consequential relief.

Case-law reviewed.

V. S. Narasimhachar for Petitioner.

P. Somasundaram and the Government Pleader (*K. Kuttikrishna Menon*) for Respondents.

K.S.

Horwill, J. Merwadi Sumermal Jaintraj Firm *v.* Bandade Thukkappa.
15th February, 1944. **S.A. No. 158 of 1943.**

Specific Relief Act (*I of* 1877), *section* 27—*Applicability—Prior agreement—Transferee without notice paying portion of consideration in cash and the remainder by adjustment of an outstanding debt—If protected.*

Section 27 of the Specific Relief Act protects a transferee who has "paid his money". If he has not paid the whole of the consideration it cannot be said that he has paid his money; for he has paid only a part of it. Where, however, a portion of the consideration was in adjustment of an outstanding debt and the remainder was paid in cash, the transferee thereby paid to the transferor all that had to be paid under the contract and can therefore literally be said to have paid his money and will be protected by the provisions of section 27 of the Specific Relief Act.

V. S. Narasimhachar for Appellant.

Kasturi Seshagiri Rao for Respondent.

K.S.

Horwill, J. Subbarami Reddi *v.* Chenchuraghava Reddi.
17th February, 1944. **S.A. No. 348 of 1943.**

Hindu Law—Joint family—Minor coparceners—Partition inter se—*If can be brought about by their paternal grandfather—Guardians—If can bring about partition in the interests of minors without recourse to Court.*

A Hindu grandfather has the same powers to effect a division amongst his minor grandchildren as a father has with regard to his minor children. Observations in 32 M.L.J. 439 (though obiter), followed.

Where the guardians of minors find it impracticable to manage the affairs of the minors without partitioning the property, they can bring about a partition, in the interests of the minors, without recourse to the Court. A.I.R. 1930 Mad. 486 and I.L.R. 39 Mad. 159, considered.

P. V. Rajamannar and *K. Subba Rao* for Appellant.

K. Umamaheswaram for Respondents.

K.S.

Mockett and Bell, JJ. Indo-Commercial Bank, Ltd. *v.* Narayanan Nambudri.
17th February, 1944. **A.A.O. No. 45 of 1943.**

Madras Nambudri Act (*XXI of* 1933), *section* 23—*Husband and wife separating from* illom—*Status of—Cannot claim partition* inter se—*Share of either—Cannot be proceeded against in execution of a decree.*

Under the Madras Nambudri Act a married man who is a member of an *illom* is entitled to claim a partition but must do so on behalf of himself and his wife. They receive their respective shares jointly and apart from the circumstance of a change of religion arising, neither of them may claim partition from the other. That places an insuperable obstacle in the way of a decree-holder seeking to execute his decree against a married member of an *illom* who has partitioned from the rest of the family. The reason is that by the terms of the statute the only remedy available to a decree-holder (to

attach and sell the right, title and interest of a co-sharer and having purchased it to compel partition against the co-sharer) is expressly denied.

(1940) 2 M.L.J. 747, considered and explained away.

S. Panchapagesa Sastri and *C. D. Venkataramanan* for Appellant.

P. Govinda Menon for Respondent.

K.S.

Horwill, J. Madura, etc., Devasthanams *v.* Solai Alagu Kudumban and others.
17th February, 1944. **S.A. Nos. 46 to 49 and 73 and 74 of 1943.**

Civil Procedure Code (V of 1908), *section* 100—*Suit by landholder of inam village against minor inamdars for damages for unauthorised taking of water from landholder's tank for second crop—Not a suit for "rent"—Claim for reimbursement of cess paid and for poruppu—Suit is of small cause nature—Second appeal—Does not lie.*

Minor inamdars who under their grant were entitled to water for only a single crop were taking water for a second crop from the tank belonging to the landholder of the inam village. A suit by the landholder against the minor inamdars for damages for the use of the water cannot be said to be a suit for "rent". The minor inamdars are not "ryots" and what is payable by them will not be rent.

(1940) 1 M.L.J. 160=I.L.R. (1940) Mad. 745 and (1938) 1 M.L.J. 256=I.L.R. (1938) Mad. 381 (F.B.), distinguished.

To a minor inamdar holding directly under the grantor and not by way of an under-tenure from the landholder the first proviso to section 88 of the Local Boards Act does not apply and such minor inamdars are not intermediate landlords and a claim for reimbursement against them for cess already paid by the landholder is not one for "rent".

(1937) 1 M.L.J. 91=I.L.R. (1937) Mad. 498 (F.B.), referred to.

The claim for *poruppu* in the suit is of a small cause nature; so also the claim for interest on the amounts claimed.

The claims in the suit being of a small cause nature no second appeal lies.

K. Rajah Aiyar and *T. A. Ramaswami Reddi* for Appellants.

A. Balasubramania Aiyar v. *Meenakshisundaram* and *K. V. Srinivasa Aiyar* for Respondents in S.A. Nos. 46, 48 and 49 of 1943.

Respondents in S.A. Nos. 47, 73 and 74, not represented.

K.S.

Happell, J. Kante Ramanna *v.* Chowdari Mahammad Abdul Subhan Saheb.
25th February, 1944. **S.A. No. 515 of 1943.**

Civil Procedure Code (V of 1908), *Order* 21, *rule* 2—*Suit for possession by purchaser in execution—If can be resisted by a purchaser from the judgment-debtor on the ground that the decree had been satisfied by an uncertified adjustment out of Court and that in bringing the property to sale the decree-holder had acted fraudulently.*

In cases where the decree has been satisfied out of Court but certification of the payment or adjustment has not been made to the Court and, notwithstanding the fact that the decree has been satisfied, the decree-holder proceeds with execution of the decree,

(*i*) The judgment-debtor cannot successfully resist execution of the decree by pleading that it has been satisfied because of the bar of clause (3) of Order 21; rule 2.

(*ii*) The judgment-debtor cannot maintain a suit for an injunction restraining the decree-holder from executing the decree or a suit to set aside the sale because these suits relate to execution within the meaning of section 47 of the Civil Procedure Code.

(*iii*) The judgment-debtors can maintain a suit to recover the money paid as damages for breach of contract, because such a suit although no doubt remotely connected with the execution, discharge or satisfaction of the decree, does not directly affect the execution proceedings or anything done in pursuance of them.

The judgment-debtor (or a person claiming under him as his purchaser) cannot resist a suit for possession by the purchaser in execution of the property on the ground that the decree had been satisfied by an uncertified adjustment out of Court and that by bringing the property to sale the decree-holder had acted fraudulently. I.L.R. 57 Cal. 403 (F.B.), applied. I.L.R. 21 Mad. 356, I.L.R. 36 Mad. 357 and I.L.R, 29 Mad. 312, considered.

C. Rama Rao for Appellant.

K. V. Rangachari for Respondent.

K.S.

Horwill, J. Puttappaji *v.* Nallappa.
25th February, 1944. **A.A.A.O. No. 172 of 1941.**

Practice—Execution—Orders in—How far res judicata—*Implications from order to execute—Plea of limitation not raised in earlier petition—Effect—Limitation Act, section 3—Not applicable where there is a bar of* res judicata.

An order passed in one execution petition will operate as *res judicata* if a similar point arises for decision in a later execution petition and a decision made at one stage of exe-

cution operates as *res judicata* at a later stage. If an order to execute is passed in an execution petition, then by implication the Court has decided, (1) that the petitioner has a right to execute, (2) that the judgment-debtor is liable to satisfy the decree, (3) that the decree is executable, and (4) that it is not barred by limitation. At no subsequent stage is it open to the judgment-debtor to dispute the correctness of these four implied decisions.

A.I.R. 1937 All. 446, not approved; (1941) 1 M.L.J. 270, followed.

A decision on an application right or wrong is binding and it cannot be said that section 3 of the Limitation Act makes it obligatory upon the Court to dismiss an application made after the period of limitation even though limitation has not been set up as a defence. There cannot be any subsequent order inconsistent with the earlier one.

M. Krishna Bharathi and *S. Ramachandra Aiyar* for Appellant.

K. K. Gangadhara Aiyar for Respondent.

K.S.

Mockett, J. Puthiyetath Nayar *v.* Ammanikani Krishnan Nayar.
25th February, 1944. **A.A.O. No. 675 of 1943.**

Malabar Tenancy Act (XIV of 1930), *section* 33—*"Family"—Includes a man's son in a* marumakkatayam tarwad *and has the ordinary meaning in English—Technical meaning under Malabar Law—Not applicable.*

Whatever the technical meaning in Malabar of *tarwad* and *tavazhi* there is nowhere attached by statute any special meaning to the English word "family" in section 33 of the Malabar Tenancy Act. It must therefore be given its ordinary meaning in English which comprehends a man's sons. It cannot be said that for the purposes of section 33 of the Act the son is not a member of the father's family or *vice versa.* The word 'family' in that section must be shorn of all technical application.

The question as to the meaning of the word "family" in the other sections of the Act left open.

Accordingly where one of the male members of a *tarwad* obtained from his brothers an assignment of their interest in a leasehold and assigned such interest to his son *X* who subsequently obtained an assignment of the remaining interest of his paternal aunt in the leasehold, *X* is entitled to apply under section 33 of the Malabar Tenancy Act for purchasing the rights in the kudiyiruppu from his landlord. It cannot be said that the kudiyiruppu had not been in the continuous occupation of *X* or "members of his family" for the requisite period of ten years according to section 33 of the Act. The expression "members of his family" applies also to the son of a man governed by the Marumakkatayam Law of Inheritance.

S. Venkatachala Sastri for Appellant.

K. Kuttikrishna Menon for Respondent.

K.S.

The Chief Justice and Muniswami Chetty and Co. *v.*
Sahab-ud-din, J. Muniswami Chetty and Co.
1st March, 1944. **O.S.App. No. 37 of 1943.**

Sale of Goods Act (III of 1930), *section* 35—*Contract for sale of five bales of muslin —Stipulation that delivery should be given "ex-godown as and when goods come"—Arrival of goods on 2nd December,* 1942—*Delivery of only two bales—Demand for delivery of balance of three bales on 9th December,* 1942—*Non-compliance—Breach of contract—Damages—Relevant date for assessment—Contract Act (IX of* 1872), *section* 73—*Applicability.*

A contract was made for the sale of five bales of printed muslin and it provided *inter alia* that delivery should be given "ex-godown, as and when the goods come". A consignment of twelve bales arrived in Madras on the 2nd December, 1942, when the vendors delivered to the purchasers two of the twelve bales and after delivering two bales each to two other purchasers retained six bales for sale by themselves. The market was rising then. The purchasers having ascertained that the vendors had received twelve bales demanded delivery of three bales to make up the five bales which they had contracted for. This demand was made on the 9th December, 1942, when the prices had risen very much more. On a question as to the date to be taken into consideration for the assessment of the damages,

Held: The stipulation for delivery "as and when the goods arrived" amounted to a contract for delivery on the date of their arrival in Madras, namely, 2nd December, 1942, which must be deemed to be the date of breach. There is nothing in the Sale of Goods Act inconsistent with section 73 of the Contract Act, and it must be taken to apply. If the contract had contained no stipulation with regard to delivery the seller would not have been bound to deliver them until the buyer applied for delivery. As the contract however contained an express provision as to delivery the contract was broken on the 2nd December, 1942, when the goods arrived in Madras and the damages must be based on the market

price ruling on that date and not as on the date of failure to comply with the demand for delivery.

K. Rajah Aiyar and *A. Ramachandran* for Appellants.

C. Srinivasachari and *C. Devarajan* for Respondents.

K.S.

King and Shahab-ud-din, JJ. Srinivasan *v.* Ramaswamy Ayyar.
3rd March, 1944. **Appeal No. 206 of 1942.**

Hindu Law—Joint family—Sale of land which could not conveniently be cultivated, calculated to confer a benefit on the estate—Binding on minors—Intending purchaser not bound to see to the application of the purchase money—Nature of inquiry to be made.

The sale of land (belonging to a joint Hindu family) which could not conveniently be cultivated (because for instance of their situation in scattered lots) and the investment of the purchase money in lands which could be so conveniently cultivated can be upheld as one calculated to confer a "benefit on the estate" though such a sale may not be necessary in the sense of being absolutely indispensable. The intending purchaser is not bound to see to the application of the purchase money.

I.L.R. (1937) Mad. 906 and I.L.R. 59 Bom. 525, applied.

Nature and scope of inquiry by purchaser in such cases indicated.

T. R. Venkatarama Sastriar and *N. Sivaramakrishna Aiyar* for Appellants.

B. Sitarama Rao, K. S. Desikan and *K. Raman* for Respondents.

K.S.

Kuppuswami Ayyar, J. Narayanaswami Naidu, *In re.*
9th March, 1944. **Cr.R.C. No. 48 of 1944.**
(Cr.R.P. No. 46 of 1944).

Defence of India Rules (1939) *rule* 81 (2) (i) (*iii*)—*Charge of transporting rice in a lorry from Madras to Chittoor—Confiscation of rice—Order for on* 18*th October,* 1943—*Not valid as amendment enabling confiscation was made only on* 15*th November,* 1943.

It was only on 15th November, 1943, that there was any amendment of the Defence of India Rules which enabled the Court "trying the offence together with the coverings thereof in respect of which the Court is satisfied that the offence has been committed to be forfeited to His Majesty." Consequently an order on the 18th October, 1943, (which was prior to the coming into force of the amendment) after discharging the accused confiscating the bags of rice which were alleged to have been transported in a lorry from Madras to Chittoor is unsustainable and must be set aside. The order cannot be justified under section 517 of the Criminal Procedure Code, as no reasons for so confiscating were given by the Magistrate.

V. T. Rangaswami Ayyangar and *K. Kalyanasundaram* for Petitioner.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

K.S.

Happell, J. Tholisamma *v.* Pedda Fakir Reddi.
10*th March,* 1944. **C.R.P. No. 1401 of 1943.**

Civil Procedure Code (*V of* 1908), *Order* 47, *rule* 1—*Dismissal of suit without costs, without assigning any reason therefor—Is analogous to an "error apparent on the face of the record" justifying a review.*

The dismissal of a suit without costs, without assigning any reason therefor is analogous to an "error apparent on the face of the record" to justify a review amending the decree so to make costs follow the event.

M. S. Ramachandra Rao for Petitioner.
Ch. Raghava Rao for Respondent.
K.S.

Kuppuswami Ayyar, J. Srinivasa Rao, *In re.*
14*th March,* 1944. **Crl.R.C. No. 24 of 1944.**
(Crl.R.P. No. 23 of 1944).

Madras Prevention of Adulteration Act (*III of* 1918), *section* 5 (2)—*Food found in the possession of a person who is in the habit of manufacturing or storing like articles for sale—Presumption that they were for sale—Not irrebuttable.*

The presumption under section 5 (2) of the Madras Prevention of Adulteration Act that any food (in the present case ghee) found in the possession of a person who is in the habit of manufacturing or storing like articles for sale has been manufactured or stored by such person for sale, is not an irrebuttable presumption.

V. Rajagopala Mudaliar for Petitioner.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

K.S.

Mockett and Bell, JJ.
29th February, 1944.

Muhammad Sulaiman Sahib *v.* Municipal Council, Trichinopoly.
A.A.A.O. No. 216 of 1943.

Civil Procedure Code (V of 1908), *sections* 2 (2) *and* 96—*Order excusing delay in presenting execution petition—Not a "decree" and no appeal lies against it.*

Where all that was ordered by the Court was that the delay in presenting the execution petition should be excused, the order cannot be said to come within the definition of a "decree" under section 2 (2) read with section 96 of the Civil Procedure Code. An appeal against such an order is not maintainable. Any objection to the order excusing the delay could be taken in the appeal against the final order in the execution petition.

T. V. Ramanatha Aiyar for Appellant.

K. Kuttikrishna Menon for Respondent.

K.S.

King and Horwill, JJ.
1st March, 1944.

Anantanarayana Iyer *v.* Ramu Pattar.
Appeal No. 334 of 1942.

Mortgage—Subrogation—Person discharging subsequent mortgages on the understanding that if pre-existing simple mortgage should be discharged mortgagor would execute a usufructuary mortgage in his favour for the amounts—Claim for specific performance unenforceable because of delay in discharging simple mortgage—Right to subrogation subsists.

Where a person discharges two subsequent mortgages in favour of third parties on an express promise by the mortgagors to execute a usufructuary mortgage in his favour if the original simple mortgage should be discharged and in any case to pay interest on the amount advanced until the discharge should be effected, that person can rightly claim to be subrogated in equity to the position of the two mortgagees whose debts he discharged although it was impossible to grant any decree for specific performance of the agreement because of the simple mortgage remaining undischarged. *Oonamalai Ammal* v. *Narasimha Rao,* A.I.R. 1938 Mad. 161 and *Dinobundu Shaw Chowdary* v. *Jagamnaya Dasi,* I.L.R. 29 Cal. 154 (P.C.), relied on. The right to subrogation is not in any case conditioned by a right to obtain specific performance of the agreement). View of *Sundara Ayyar, J.,* in *Narayana Kutti Goundan* v. *Peechiammal,* 22 M.L.J. 364: I.L.R. 36 Mad. 426, held to be *obiter dicta* and not followed. *Adari Sanyasi* v. *Nookalamma,* I.L.R. 54 Mad. 708, distinguished.

C. S. Swaminathan for Appellant.

P. S. Narayanaswami Aiyar for Respondent.

K.S.

Chandrasekhara Ayyar, J.
10th March, 1944.

Venkanna *v.* Brahmudu.
S.A. No. 888 of 1943.

Limitation Act (IX of 1908), *Article* 11—*Applicability—Settlement of sale proclamation —Mortgagee of property denying decree-holder's allegation that his mortgage was collusive and praying for sale subject to his mortgage—Settlement of sale proclamation notifying the mortgage with the remark that it was alleged to be collusive—Suit on mortgage after one year of settlement of proclamation—Barred under Article* 11 *of the Limitation Act—Civil Procedure Code (V of* 1908), *Order* 21, *rule* 63—*Applicability.*

In filing certain sale papers in connection with the execution of a decree for the payment of money, the decree-holder referred to the existence of two mortgages on the property but stated that they were collusive transactions. On this, notice was ordered to the mortgagees. One of them appearing in answer to the notice filed a petition stating that the mortgage in his favour was a true one and that it was fully supported by consideration and asking the Court for directions that the sale of the property should be held subject to his mortgage. The Court ultimately directed in settling the draft proclamation that the particular mortgage and another should be notified at the time of the sale with the remark that the decree-holder alleged that they were collusive. In a suit on the mortgage filed more than one year after that date,

Held: The provisions of Order 21, rule 63 of the Civil Procedure Code will be attracted even in cases of applications filed by mortgagees in the course of the settlement of sale proclamation. 31 M.L.J. 247; 37 M.L.J. 159 and 38 M.L.J. 397, relied on.

When the mortgagee prayed for an order that the property should be sold subject to his mortgage the Court did not grant him that relief, though it did not decide the question of the genuineness of the mortgage. Accordingly the suit on the mortgage was barred under Article 11 of the Limitation Act.

(1941) 2 M.L.J. 956: I.L.R. (1942) Mad. 336 (F.B.), applied.

K. Bhimasankaram for Appellant.

C. Rama Rao for Respondent.

K.S.

N R C

King and Horwill, JJ. Chidambaram Chettiar *v.* Nagappa Chettiar.
13*th March*, 1944. **Appeal No. 364 of 1942.**

Court-Fees Act, (VII of 1870), *section* 7 *(IV) (A)—Suit by* quandom *minors for a declaration that a compromise decree in a prior suit filed by their father and themselves was not binding on them—Proper valuation.*

A suit was brought by two brothers in a Nattukottai Chetti family for a declaration that a compromise decree passed in 1929 was not binding on them. That decree was passed in a suit of 1924 in which the two plaintiffs and their father sought to set aside an agreement by the father with the other members of the family as one having been extorted from him in circumstances which would make it not legally binding upon him. In the suit of 1924 the plaintiffs who were then minors were at first represented by their mother as next friend but they and their father jointly filed a single plaint and were represented by a single legal adviser. While that suit was pending the father entered into a compromise with the defendants. On the 6th November, 1929, the Court ordered the substitution of the father as next friend of the minors after which the father and the defendants filed a memorandum of compromise which was certified by the Court to be for the benefit of the minors. That memorandum formed the basis of the decree. On attaining majority the plaintiffs sued to have it declared that the compromise and the decree were not binding on them and paid a court-fee of Rs. 500 under Article XVII-A of Schedule II of the Court-Fees Act. On the question of court-fee payable,

Held: Though they may not ask for cancellation of the prior decree such a prayer is necessarily implied and therefore the suit must be valued *ad valorem*.

V. Ramaswami Aiyar for Appellants.

K. Bashyam Aiyangar, T. R. Srinivasan, R. Rangaswami Aiyangar and *R. Desikan* for Respondents.

K.S.

Happell, J. Subramanyam *v.* Rami Reddi.
16*th March*, 1944. **C.R.P. No. 1486 of 1943.**

Sale of land—Provision in sale deed that vendee shall "hereinafter" enjoy all "hakkulu badyathala"*—Construction—Liability for property tax—Ambiguity in deed—Vendee entitled to construe words in a manner advantageous to himself.*

When the word *"badyathala"* is used in conjunction with *"hakkulu"* the meaning ordinarily attached to the word is "rights and interests" although when used alone or in opposition to the word *"hakku"* the more ordinary meaning may be liability. From a provision in a sale-deed that vendee shall thereafter have all *hakkulu badyathala* it cannot be said that the liability as for instance for municipal property tax is contracted to be paid by the vendee.

In any case the words are not unambiguous and if the vendor fails to express himself with reasonable clearness, if he uses expressions reasonably capable of misconstruction, if he uses ambiguous words, the purchaser may generally construe them in the manner most advantageous to himself and make the vendor liable for the property tax due.

Seaton v. *Mapp*. (1846) 2 Coll. 556: 63 E.R. 859 at 862, relied on.

M. S. Ramachandra Rao and *D. R. Krishna Rao* for Petitioner.

J. V. Srinivasa Rao for Respondent.

K.S.

Happell, J. The Public Prosecutor, Madras *v.* Kuppuswamy.
23*rd March*, 1944. **Crl.App. No. 79 of 1944.**

Madras Motor Vehicles Taxation Act (III of 1931), *section* 7*—Hirer of motor vehicle passing it to military authorities under an agreement—Liability to prosecution for non-payment of tax, as person having possession of vehicle.*

The accused was a contractor for the third Madras Regiment at Bellary which had hired a motor vehicle from him from 13th December, 1942, to 24th December, 1942. The accused had hired the vehicle from its owner before passing it to the military authorities. In a prosecution for non-payment of tax due on the vehicle for that quarter,

Held: Although the accused was neither in "possession nor in control" while the vehicle was in the custody of the military authorities, he was certainly in possession for some period during the quarter in respect of which the tax had to be paid before he handed over the vehicle to the military. Technically, therefore, he was a person having possession within the meaning of section 7 of the Madras Motor Vehicles Taxation Act, and was punishable by fine as the tax had not been paid in respect of the motor vehicle during the quarter.

The Public Prosecutor (*V. L. Ethiraj*) in person.

A. T. Sundaravaradhan for Respondent.

K.S.

Chandrasekhara Ayyar, J. Kothandaramaswami Temple at Adembar *v.*
7th March, 1944. Veezhinatha Ayyar.
S. A. No. 862 of 1943.

Madras Hindu Religious Endowments Act (II of 1927), *section* 73—*Suit by trustees of temple for recovery of grains or their value deliverable to them under the terms of a will—Sanction of the Board not essential—Distinction between section 73 of the Madras Hindu Religious Endowments Act and section* 92, *Civil Procedure Code (V of* 1908).

Section 73 (3) of the Madras Hindu Religious Endowments Act contemplates only a suit which has the direct effect of interference in the administration or management and cannot apply to a suit by the trustees of a temple for the recovery of paddy or their value deliverable to them under the terms of a will. Though in one sense the payment of money for one trust can be said to be done only in the course of administration or management such a dim and distant connection with the administration or management of a trust is not what is contemplated by section 73 (3) of the Act.

Distinction between section 92 of the Civil Procedure Code and section 73 (2) of the Madras Hindu Religious Endowments Act considered.

T. V. Ramanatha Aiyar and *S. Sitarama Aiyar* for Appellants.
S. Tyagaraja Aiyar for Respondents.
K.S.

(F.B.).
The Chief Justice, Wadsworth, and Patanjali Sastri, JJ. Srinivasa Ayyar *v.* Swaminatha Odayar.
14th March, 1944. **Appeal No. 162 of 1942.**

Madras Agriculturists Relief Act (IV of 1938), *section* 3(ii), *Proviso C—Scope and effect—Assessment to property tax—If should be in the name of debtor in the municipal assessment register so as to exclude him from the definition of an 'agriculturist'.*

A case comes within Proviso C to section 3 (*ii*) of Madras Act IV of 1938 when the following factors are present:—

(*i*) There is property which has an annual rental value of not less than Rs. 600;

(*ii*) the property has been assessed to house or property tax for two years immediately preceding the 1st October, 1937; and

(*iii*) the municipality demands or recovers the tax from the owner or otherwise treats him as liable to pay the tax.

The decision in *Swaminatha Odayar* v. *Srinivasa Ayyar,* (1939) 2 M.L.J. 495, is erroneous in that, it holds that a person cannot be assessed within the meaning of the proviso unless the assessment is made in his name in the municipal assessment register.

The insertion in the assessment register of the name of the true owner of the property is not the deciding factor.

M. S. Venkatarama Ayyar for Appellant.
R. Gopalaswami Ayyangar for Respondent.
K.S.

Happell, J. Panchayat Board, Badagara *v.* Narayana Kurup.
15th March, 1944. **C.R.P. No. 1492 of 1943.**

Madras Local Boards Act (XIV of 1920), *section* 21 (2)—*Suit by the president in the name of the Panchayat Board without resolution of the Board sanctioning the filing —Subsequent ratification by Board—Cannot cure the defect.*

Where a suit to recover arrears of tax is filed by the president of a Panchayat Board without a resolution of the Board sanctioning such filing the subsequent ratification by the Board cannot cure the defect.

Notified Area Committee, Okara v. *Kidar Nath,* I.L.R. 17 Lah. 35, followed.

The President of the Board has no more right to institute a suit to recover arrears of tax than any other third party and the Court is not competent to try the suit and must dismiss the same.

The defect cannot be cured under the provisions of O. 1, R. 10 of the Code of Civil Procedure as until a resolution by the Panchayat Board sanctioning the institution of the suit, neither the Board nor any one else had a right of suit. I.L.R. 30 Mad. 419, distinguished.

C. K. Viswanatha Ayyar for Petitioner.
T. K. Rajagopalan for Respondent.
K.S.

Horwill, J. Sathiraju *v.* Madhava Rao.
17th March, 1944. **S.A. Nos. 208 and 756 of 1943.**

Madras Estates Land Act (I of 1908), *section* 128—*Person suing for specific performance of contract to sell the lands to him—If a "person having an interest in the holding" within the meaning of section* 128—*Payment by him of rent due thereon—Right to recover from another purchaser of the holding—Contract Act (IX of* 1872), *sections* 69 *and* 70—*Not applicable in the circumstances.*

N R C

A contract to sell or mortgage does not create an interest in land. Section 128 of the Madras Estates Land Act requires that a person who wishes to pay the money should have an interest in the holding or part of it, which must mean an interest in the land, for the land is the holding. A person who brings a suit for specific performance of a contract to sell the land to him does not acquire an "interest in the land" even on the date of the decree. The decree merely orders the defendant to perform the contract to which he was a party. The actual conveyance has to be brought about by executing the decree; and until the deed has been drawn up and registered no actual conveyance takes place. The plaintiff in a suit for specific performance of an agreement to sell the holding to him who pays the rent to the landholder or deposits the money in Court for payment to the landholder, cannot be said to be a person having an interest in the holding so as to acquire the right under section 128 of the Madras Estates Land Act. The analogy of Order 21, rule 90 of the Civil Procedure Code is not applicable as that rule does not require that a person should have an interest in the property which is the subject of the sale. That rule gives a right to intervene in proceedings to any person whose *interests* are affected by the sale. The word *"interests"* is not a mere plural of the word *"interest"*.

The payment of the rent by the plaintiff must be deemed to be for himself in order to save from sale land in which he was interested, although in doing so he incidentally benefited the vendor and persons claiming through him. He was not paying for the alienee from the vendor of the property who can be said to be bound by law to pay it. Accordingly sections 69 and 70 of the Contract Act, are not applicable to the case. Apart from section 69 of the Contract Act, there is no general principle of justice, equity and good conscience which can avail the plaintiff.

P. Somasundaram for Appellant.

C. Rama Rao for Respondent.

K.S.

Chandrasekhara Ayyar, J. Subba Reddi *v.* Venkataramayya.

23rd March, 1944. **S.A. No. 738 of 1943.**

Hindu Law—Joint family—Managing member—Power to renew time-barred debt —Debt though barred on the date, enforceable by reason of provisions of section 4 of the Limitation Act (IX of 1908)—If empowers manager to renew the debt.

The managing member of a joint Hindu family consisting of himself and his two undivided brothers renewed a promissory note, dated 19th May, 1931, by a fresh promissory note on 12th June, 1934, after the expiry of the three years' period of limitation prescribed by the Limitation Act. In a suit on the renewed promissory note the plaintiff contended that as the Court in which the suit could be filed happened to be closed for summer recess when the three years' period of limitation expired with reference to the earlier promissory note and as he could have filed a suit on the reopening day, a manager of the family had a right to renew the debt by the execution of a fresh promissory note on the reopening day and thus stave off the suit.

Held, that the manager had no power to renew or revive the promissory note which had become barred by limitation in the absence of any express authority to do so by the other coparceners. The provisions of section 4 of the Limitation Act cannot be applied so as to extend such powers of a manager.

I.L.R. 5 Mad. 169 (F.B.); I.L.R. 55 Cal. 1210 and (1937) 1 M.L.J. 262, referred to.

[Leave granted as there is no direct authority on the question.]

Ch. Raghava Rao for Appellant.

V. S. Narasimhachar for Respondent.

K.S.

Chandrasekhara Ayyar, J. Narasimham *v.* Kunchemma.

27th March, 1944. **S.A. No. 817 of 1943.**

Specific Relief Act (I of 1877), section 55—Mandatory injunction to restrain encroachment by building steps into a common lane belonging to plaintiff and defendant—Delay, indirect motive, absence of real inconvenience and so forth of plaintiff in asking for—Effect.

Where property is held in common by co-owners, one co-owner has no right to build on the property or alter it in any manner without the consent of the others and if he does so, the other co-owner can seek reliefs in a Court of law by asking for a mandatory injunction or other relief not only in cases where the construction or the alteration amounts to a nuisance or causes inconvenience, but also in cases where it is a mere infringement of their joint rights. But it is not an absolute rule to be followed irrespective and independent of the facts of each case.

Where the plaintiff the co-owner of a common lane asks for a mandatory injunction to restrain the other co-owner constructing steps encroaching on the lane, if there has been delay, indirect motive, absence of real inconvenience and so forth a mandatory injunction cannot be granted.

P. Somasundaram for Appellant.

K. Kameswara Rao for Respondent.

K.S.

Happell, J. Ramaswami Chettiar *v.* Shanmugham Chettiar.
17th March, 1944. **A.A.A.O. No. 121 of 1943.**

Provincial Insolvency Act (*V of* 1920), *section* 4—*Insolvent compromising claims without reference to the Official Receiver—Not entitled to apply except through the Receiver for declaration that all his debts had been discharged.*

An insolvent who compromises the claims against his estate and discharges them behind the back of the Official Receiver is not entitled to apply to the Insolvency Court for a declaration that his debts had been discharged and he cannot ask for an injunction restraining the Official Receiver from recognising certain persons as creditors or making any disbursements to them.

The Receiver represents the estate and it is not open to the insolvent in the circumstances to make applications as if the Receiver did not exist.

B. Sitarama Rao, T. Krishna Rao and *R. Subramaniam* for Appellant.

R. Gopalaswami Aiyangar, R. M. Halasyam, N. Srinivasa Aiyangar and *N. S. Narayanachari* for Respondent.

K.S.

The Chief Justice and Shahab-ud-din, J. Chinnavan Rowther, *In re.*
21st March, 1944. **Crl.R.C. No. 1024 of 1943.**
(Crl.R.P. No. 963 of 1943.)

Defence of India Rules (1939), *rule* 81—*Powers conferred by—Delegation under section* 2 (5) *of the Defence of India Act by Provincial Government to Additional District Magistrates and Sub-Divisional Magistrates on 27th July,* 1942—*Order by a District Magistrate prohibiting export of paddy or rice to places outside the District—Validity.*

The order by the Additional District Magistrate of Madura, dated 18th February, 1943, notifying that "No person shall export any amount of paddy or rice, however small, from any place in Madura District to places outside its limits except under a permit issued by the Collector of Madura or by an officer authorised by him" is *intra vires* his powers under rule 81 of the Defence of India Rules delegated on the 27th July, 1942, by the Provincial Government. The Additional Magistrate was lawfully authorised to prohibit the transport of rice or paddy from that District without a permit and a person contravening that order is liable to be convicted for the offence.

K. S. Jayarama Ayyar and *S. K. Ahmed Meeran* for Petitioner.

The Advocate-General (*Sir A. Krishnaswami Ayyar*) and the Assistant Public Prosecutor (*N. Somasundaram*) on behalf of the Crown.

K.S.

King and Horwill, JJ. Basayya *v.* Hanumantha Reddi.
23rd March, 1944. **A.A.O. No. 473 of 1943.**

Civil Procedure Code (*V of* 1908), *section* 60 (1) (c)—*House in the occupation of agriculturist—Failure to claim exemption from attachment in earlier stages of execution—Effect—Bar of constructive* res judicata—*Applicability—No public policy against alienation of agriculturist's house so as to bar applicability of* res judicata.

If a person in the course of execution proceedings does not raise an objection to the sale of property which, if raised, would prevent the property from being brought to sale, he is debarred by the principle of constructive *res judicata* from raising the same objection either in subsequent proceedings or at a subsequent stage in the same execution proceedings.

Where a house in the occupation of an agriculturist debtor is proceeded against in execution but the agriculturist debtor fails to claim the exemption under section 60 (1) (*c*) of the Civil Procedure Code he cannot raise that objection subsequently. The question whether a particular house is a house in the occupation of an agriculturist is a question of fact. If there is nothing before the Court to show that the house sought to be sold is a house in the occupation of an agriculturist, it cannot be said that the Court acted without jurisdiction in selling that house.

Section 60 (1) (*c*) was enacted to protect agriculturists. The protection can, however, be waived by the agriculturist; and if he can waive his right under section 60, there cannot be any absolute prohibition against the sale of an agriculturist's house, and therefore no bar to the application of the principle of constructive *res judicata*. Moreover, the fact that section 60, Civil Procedure Code, prohibits only the attachment of an agriculturist's house and does not prevent an agriculturist from selling his house privately if he so wishes is an indication that there is no public policy against the alienation of an agriculturist's house.

Kasturi Seshagiri Rao for Appellant.

P. Chandra Reddi and *K. Venkataratnam* for Respondent.

K.S.

NRC

The Chief Justice and Mockett, J. Sachidananda Krishnaghate—Petitioner.
24th March, 1944. **Crl. Mis. Petn. No. 287 of 1944.**

Restriction and Detention Ordinance (Ordinance No. III of 1944), sections 6 and 10—Effect—Order of detention made under rule 26 of the Defence of India Rules—Validation—Orders cannot be called in question in any Court and Court has no power to make an order under section 491 of the Criminal Procedure Code (V of 1898).

Section 6 of the Restriction and Detention Ordinance, 1944, says, that no order made before the commencement of the Ordinance under rule 26 of the Defence of India Rules shall after such commencement be deemed to be invalid or be called in question on the ground merely that the rule purported to confer power in excess of the powers that might at the time the order was made be legally conferred by a rule made under section 2 of the Defence of India Ordinance, 1939, or under section 2 of the Defence of India Act, 1939. The new section retrospectively validates such orders under rule 26 of the Defence of India Rules. Section 10 of the new Ordinance says that no order made under the Ordinance and no order having effect by virtue of section 6 as if it had been made under the Ordinance shall be called in question in any Court, and no Court shall have power to make an order under section 491 of the Code of Criminal Procedure.

J. R. Gundappa Rao for Petitioner.

K.S.

Chandrasekhara Ayyar, J. Doraiswami Aiyar *v.* Ramaratnam Iyer.
29th March, 1944. **S.A. No. 822 of 1943.**

Civil Procedure Code (V of 1908), section 100—Suit for damages for malicious prosecution—Finding that plaintiff has not proved absence of reasonable and probable cause is one of fact and cannot be interfered with in second appeal.

In a suit for damages for malicious prosecution a finding that the plaintiff has not proved absence of reasonable and probable cause is a question of fact and cannot be interfered with in second appeal.

I.L.R. 25 Bom. 332 (P.C.), I.L.R. 24 Mad. 549, 10 L.W. 314 and 53 M.L.J. 375, relied on.

(1938) 2 M.L.J. 296, not followed.

P. V. Subramanyam for Appellant.

R. Ramamurthi and *A. R. Krishnaswami* for Respondent.

K.S.

Horwill, J. Masulipatam Municipality *v.* Narayanamurti.
31st March, 1944. **C.R.P. No. 299 of 1943.**

Civil Procedure Code (V of 1908), Order 29, rule 1-A—Suit against local authority—Right to not less than two months' time to appear and answer—Summons fixing a shorter period and vakil for municipality appearing and asking for time for filing written statement—Grant of such time once or twice—Effect on right to two months' time for answering summons.

In a suit against a municipality the summons was issued on 4—8—1942 and the Court disregarding rule 1-A of Order 29 of the Civil Procedure Code fixed 31—8—1942 for appearance of vakil who had by that time been engaged by the municipality and he appeared on the date fixed by the Court but asked for time for filing the written statement. The Court granted time until 9—9—1942 and again until 16—9—1942. On 16—9—1942, the vakil for the municipality represented that he had not been able to file a written statement and asked for still further time. The suit was adjourned to 23—9—1942 on condition of the municipality paying Rs. 2, costs. On 23—9—1942 the municipality filed a petition to set aside the order as to costs on the ground that the municipality should have been allowed two months from the date of summons to appear and answer the summons. The Court rejected the petition holding that rule 1-A of Order 29 was not applicable after putting in appearance. On revision, *Held*: Order 29, rule 1-A, allows not less than two months to a local authority not merely to appear but to answer. The fact that the vakil appeared in Court and said that he had been authorised to represent the municipality did not deprive the municipality of its right to have two months to answer the plaint. A local body—unlike a private person—has ordinarily no knowledge of the matters in dispute and needs time to make enquiries—sometimes extensive enquiries—before it is in a position to answer a plaint.

K. Venkataramaraju for Petitioner.

K. Bhimasankaram for Respondent.

K.S.

Chandrasekhara Ayyar, J.
29th March, 1944.

Mammad Neyi *v.* Cannanore Municipality.
S.A. No. 945 of 1943.

Madras District Municipalities Act (*V of* 1920), *section* 83, *proviso as amended by Act* (*XXI of* 1939)—*Cancellation of exemption from property tax—Tax leviable for whole half year and not merely after the coming into force of the amending Act—Assessee failing to appeal to council—Finality of assessment—Recourse to Civil Court barred.*

On 29—8—1939, when the Amending Act XXI of 1939, came into force, section 83 must be deemed to have enacted that there was no exemption from property tax so far as certain buildings used for educational purposes were concerned. The Act does not say and does not even purport to say, that the liability was to take effect from a particular date. What was the period for which the tax could be levied must be ascertained from the four corners of the statute itself in the absence of other data and for this purpose resort must be had to the Taxation and Finance Rules. Rule 8 (2), provides that if a particular procedure is followed by the executive authority with reference to the amendment of the assessment books between one general revision and another, the amendment shall be deemed to take effect on the first day of the half year in which it is made. The assessment shall relate to the entire half year and not merely to the period after the amendment. The position must be viewed as if the statute had stated that there would be no exemption from property tax for the half year in question provided of course the provisions laid down in the rules were followed.

If the revision of assessment is not challenged in the manner provided by the statute the owner of the property cannot come before a civil Court.

D. Ramaswami Aiyangar and *M. C. Sridharan* for Appellant.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *K. Subramanyam* for Respt.

K.S.

Chandrasekhara Ayyar, J.
31st March, 1944.

Somasundara Vellala Thevar *v.* Sri Kothandaramaswami Devasthanam.
A.A.O. No. 286 of 1942.

Madras Estates Land Act (*I of* 1908)—*Ryot who had obtained patta through revenue Court—Suit for injunction restraining rival lessee from landholder interfering with his possession—Jurisdiction of civil Court not ousted.*

Where after having got a patta from the landlord as the result of the decree of a Revenue Court and thus obtaining recognition of his right to remain in possession as an occupancy ryot, his possession is interfered with either by the landholder or by some other person claiming as lessee under the landholder, there is nothing in the Madras Estates Land Act which compels the ryot once again to go before the Revenue Court to seek redress. He does not want a patta, as it has already been granted to him; he does not seek to establish any occupancy rights in the property, as (in the present case) this had been determined in his favour both by the Revenue Court and the Civil Court. If the only remedy he wants is an injunction restraining those who attempt to interfere with his possession, be he the landholder or any person who claims under him, the jurisdiction of the Civil Court to try the suit is not ousted.

S. Panchapagesa Sastri and *T. R. Sundaram* for Appellant.

A. V. Viswanatha Sastri and *S. Muthiah Mudaliar* for Respondent.

K.S.

Kuppuswami Ayyar, J.
3rd April, 1944.

..Bhupathi Naicken *v.* The President, Panchayat Board, Sembiam.

Crl. R. C. No. 186 of 1944.
(Crl. R. P. No. 177 of 1944.)

Madras Local Boards Act (*XIV of* 1920), *section* 171 (1)—*Running a private market for three days—Conviction—Three different sentences cannot be awarded—Proper procedure.*

Where a person is prosecuted for running a private market without a license on three days, the fact that the market was run for three different days does not enable the Court to award three different sentences. The accused would be punished once and if he continues again after the first conviction to run the market without a license, the Act provides for an enhanced punishment being awarded for each subsequent breach.

V. T. Rangaswami Aiyangar for *M. C. Sridharan* for Petitioner.

Respondent not represented.

K.S.

N R C

Kuppuswami Ayyar, J.
4th April, 1944.

Rajah of Venkatagiri *v.* Koti Redd
A.A.A.O. No. 198 of 194

Civil Procedure Code (V of 1908), section 47—Execution petition—Order on—"Bo not ready—Dismissed"—Appealability—Order not one of dismissal for default—Order co clusively determines the matters in controversy.

In an execution petition seeking to recover possession of certain properties accordir to the terms of a decree, the judgment-debtor pleaded that the decree-holder was not ei titled to recover possession as per terms of the decree as he had effected certain repai at a very heavy expense and completed them in time and he also pleaded that the petitic was barred by limitation. When the petition came on for hearing it was dismissed an the order ran: "Both not ready—Dismissed". An appeal by the decree-holder was di missed on the ground that the appeal did not lie as the order appealed against did not amou to a decree. On second appeal,

Held, (1) The effect of the parties stating that "they were not ready" will be the sam as failure to let in the necessary evidence in respect of which the burden of proof was o the party failing to let in evidence. It cannot be said that there has been either nor appearance, non-prosecution or non-payment of process fees. Accordingly the order car not be said to amount to an order of dismissal for default.

(2) The order conclusively determines between the parties to the suit the question in controversy and relates to the execution of the decree. It amounts to an order refusin to grant the prayer of the decree-holder that he should be put in possession of the prc perties as per terms of the decree in execution. The order therefore amounts to a decre and is therefore appealable.

P. V. Rajamannar for Appellant.

K. Umamaheswaram for Respondent.

K.S.

Chandrasekhara Ayyar, J.
5th April, 1944.

Manicka Nadar *v.* Atheenakartha of Sengole Matam Perungulam
S.A. No. 836 of 1943

Usufructuary mortgage—Provision that mortgagee was to enjoy the property for elevei years from date of the mortgage after the expiry of which the mortgagor was to pay th amount and have the properties redeemed—Mortgagee directed to pay out of the conside ration various sums due by mortgagor to creditors—Failure of mortgagee to pay the amount and mortgagor discharging the debts—Mortgagor, if can claim to redeem before expiry of th term of eleven years.

It was provided in a usufructuary mortgage, that the mortgagee was to be in possessior and enjoy the property for a period of eleven years from the date of the mortgage and tha after the expiry of the period the mortgagor shall pay the amount and have the mortgagec property redeemed. The consideration of Rs. 625 was made up of three items—a sum o Rs. 214-14-11 due to one *M*, a sum of Rs. 310-1-1 due to one *S*, and a sum of Rs. 100 paic in cash. The mortgagee was directed to pay the sums due to *M* and *S*, but he did not pay the amounts, and the mortgagor discharged the debts owing to pressure from the creditors. Though it was only one year from the date of the mortgage, the mortgagor brought a suit for redepmtion. The suit was resisted as premature as it was brought before the expiry of the eleven years period fixed in the deed.

Held: The period fixed for redemption in the deed must govern the rights and relations of the parties in the absence of a contract to the contrary. If one of the parties does not fulfil the requirements or obligations imposed on him the other party may have a remedy in damages against him. Failure on the part of the mortgagee to advance the full amount does not entitle the mortgagor to seek possession of the mortgaged property.

N. S. Sundaram for Appellant.

A. Swaminatha Aiyar for Respondent.

K.S.

Wadsworth, J.
6th April, 1944.

Srinivasachari *v.* Sait Chunilal Mulchand and Co.
C.R.P. No. 338 of 1943.

Madras Agriculturists' Relief Act (IV of 1938), section 19—Application under—Desirability of Court determining whether there is a subsisting and enforceable decree and if subsisting whether it has to be scaled down.

In an application under section 19 of the Madras Agriculturists' Relief Act it is desirable that the Court of first instance should determine firstly whether there is a subsisting and enforceable decree, and secondly whether that decree if subsisting has to be scaled down. See *Satyanarayanamurthy* v. *Srinivasa Jagannadha Rao,* (1943) 2 M.L.J. 135. The decision in *Subba Rao* v. *Vemmanna Seshayya,* (1942) 2 M.L.J. 551, proceeds on the wording of the rules under the Act and does not apply to proceedings under section 19.

T. C. A. Bashyam for Petitioner.

T. Ramamurthi for Respondent.

K.S.

Kuppuswami Ayyar, J.
18th April, 1944.

David *v.* Rangaraju.
A.A.O. No. 228 of 1943.
and C.R.P. No. 524 of 1943.

Lease by receiver in mortgage suit—Execution sale of leased property—Term in lease that rent was payable on a day which was beyond the date of auction sale—Person entitled to the rent.

In a lease for one year by the receiver in a mortgage suit one of the terms was that the rent was payable on 31st December, 1941. At the auction sale in execution of the decree a stranger purchased the property on 18th December, 1941. The auction purchaser claimed the right to receive the entire rent as it was payable on a date subsequent to his purchase, but the decree-holder contended that he was entitled to the entire amount due under the lease as rent was payable to the receiver appointed in his suit and that right cannot be said to have passed to the auction-purchaser.

Held: that the rent has to be apportioned between the auction-purchaser and the receiver representing the estate according to the principle contained in section 36 of the Transfer of Property Act.

Rangiah Chetty v. *Vajravelu Mudaliar,* (1917) I.L.R. 41 Mad. 370, held not to have been overruled by *Phirozshaw Bomanjee* v. *Bai Goolbai,* (1923) I. L. R. 47 Bom. 790 (P.C.) and followed.

P. Somasundaram for Appellant.

G. Chandrasekhara Sastri for Respondent.

K.S.

Kuppuswami Ayyar, J.
18th April, 1944.

Yoganathan *v.* Kandaswami Pillai.
A.A.O. No. 211 of 1943.

Practice—Suit on behalf of minor by his next friend for accounts in respect of management of minor's properties—Preliminary decree directing filing of accounts—Appointment of commissioner—Non-payment by plaintiff of commissioner's fees and vakil for minor reporting no instructions—Dismissal of suit in toto—Not justifiable.

A suit was filed by the next friend of a minor calling for the accounts of the management of the minor's properties. A preliminary decree was passed directing the defendant to file the accounts. A commissioner was appointed and time was granted for payment of the fees due to the commissioner. It was not paid in time with the result that the vakil reported no instructions. The plaintiff was absent and the suit was dismissed in *toto* with costs. A petition was filed for setting aside the dismissal order and that petition was also dismissed. On appeal against that order,

Held: The trial Judge was not justified in dismissing the suit in *toto* after the preliminary decree was passed. He could have called upon the defendant to pay the commission fees and made the necessary orders for enabling the defendant to recoup it from the estate of the minor plaintiff.

D. Ramaswami Aiyangar and *P. S. Srinivasa Desikan* for Appellant.

Respondent not represented.

K.S.

N.R.C.

Kuppuswami Ayyar, J.
20th April, 1944.

Pullamma *v.* Thatalingam.
Cr.R.C. No. 165 of 1944.
(Cr. R. P. No. 156 of 1944.

Criminal Procedure Code (V of 1898), *section* 488—*Wife living away from husband not because of any physical ill-treatment—Husband marrying a second wife after some years—Not "cruelty"—Claim of first wife to maintenance under section* 488 *of Criminal Procedure Code—Offer to take her back—Effect.*

A husband was living with his parents and there was not much of cordiality between his parents and his wife with the result that the latter left the house. After waiting for some years the husband married a second wife. The husband offered to take back the first wife, who however refused to go and live with him. Hence her petition for maintenance under section 488, was dismissed on the ground that there was no cruelty and no neglect on the part of the husband. On revision it was urged that the offer of the husband to take back the wife could not be accepted as a *bona fide* one.

Held: As there was nothing in the present case to indicate that the wife received any physical illtreatment at the hands of her husband and it was only incompatibility of temperament which prevented the wife from living amicably with her husband's parents that resulted in her leaving her husband's house she will not be entitled to claim any maintenance.

So long as the husband is not guilty of any cruelty or of neglect, she is bound to go, and live with him. The mere fact that the husband has taken a second wife and that too after waiting for several years and after the first wife refused to join him cannot be said to amount to cruelty.

Sundarammal v. *Palaniandi Mudali,* (1940) 1 M.L.J. 171, distinguished.

T. V. Ramanatha Iyer and *V. Viyanna,* for Petitioner.

Respondent *ex parte.*

K.S.